No. 1240.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

FILED
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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA.

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STATEMENT OF FACTS.

This cause has been in this Court on a former writ of error, and is found reported in 102 Fed. 430, wherein a judgment was rendered in this Court affirming a judgment rendered in the Circuit Court of the District of Montana, in favor of the said defendant in error, and against the plaintiff in error herein, for the sum of Twenty-three Thousand, Two Hundred and Nine ($23,209.) Dollars. On the former trial, the defendant in error

being dissatisfied with the verdict rendered, sued out a writ of error, and the case upon this writ of error is again found reported in 104 Fed. 664. Upon this writ of error the judgment of the lower court was, in terms, reversed, and the same was to have been remanded to the Circuit Court for a new trial, as to the right of the St. Louis Company to recover for all damages by them sustained by reason of ores mined out by the Montana Company, between what it terms its 108 and 133 foot planes. Thereupon the Montana Company sued out a writ of error to the Supreme Court of the United States from both of the orders herein made against it, as above stated, and the case is reported in 186 U. S. p. 24. The Supreme Court construed the judgment rendered by this Court, on the St. Louis Company's writ of error, as being an absolute reversal of the judgment of the lower court, and therefore held that, there being no final judgment, it was without jurisdiction to hear it, and thereupon dismissed the writ of error.

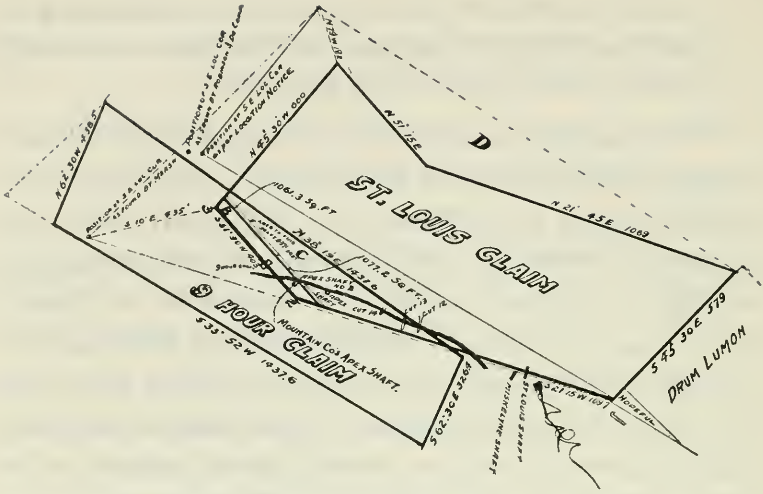
On the filing of the mandate from the Supreme Court a petition was filed in this Court on behalf of the Montana Company, praying for the issuance of a single remittitur in the cause. and this petition came on to be heard on the 6th day of October, 1902. Thereupon, and on the 8th day of the same month, this Court entered another judgment in said cause, which after reciting the former judgments entered, concludes as follows:

> "It is now ordered and adjudged, that the judgments so heretofore made and entered herein be VACATED AND SET-ASIDE, and that in lieu thereof. it is ordered and adjudged that the judgment of the

said Circuit Court in this cause be, and the same is hereby, reversed with costs, and the causes remanded to said Circuit Court for a new trial.''

The remittitur sent down by the clerk of this Court, commanded that such new trial be had in the cause in accordance with the judgment of this Court filed and entered on the 8th day of October, A. D. 1902 and as according to right and justice, and the law of the United States, ought to be had. Notwithstanding this clear injunction to the Circuit Court to try the case *de novo,* and as if the two former judgments in this case had not been had, the lower court on its retrial adhered strictly to the facts and the law, as found determined in the two opinions in question, which had been vacated and set-aside as already stated. The court therefore refused to pass independently upon any question of law arising during the trial, but held, as to all questions considered in either of said opinions that the determination of the question by this court was absolutely final. In other words, the Court below held, that notwithstanding the two judgments had been revoked and set-aside, the opinions rendered were nevertheless, ''the law of the case.''

The subjoined diagram may give a clearer idea of the relative situation of the two claims and of the ground in controversy. It is taken from a photograph of the defendant's surface map, marked (Defendant's Exhibit ''E''.) and was introduced in evidence on the re-trial of the case.



A. Nine Hour Discovery Shaft.

B. Compromise Ground between Corners Nos. 2 and 3 of St. Louis Claim.

C. Original conflict between Nine Hour and St. Louis.

D. St. Louis as described in its Location Notice.

When this case was before this Court on the former hearing, our contention was that the rights of the parties were absolutely concluded and determined by the bond for a deed, attached to our answer as Exhibit "A", by the judgment and decree in the action brought to enforce the specific performance of the bond, and by the deed for the Compromise Ground which the St. Louis Company was compelled to execute, in obedience to the decree which we obtained against it. The bond stipulated for the conveyance to William Robinson and his assigns of the thirty foot strip paralled to the east side line of the St. Louis Claim between corners numbered 2 and 3, generally called the Compromise Ground, "together with all

the mineral therein contained." The ownership of the mineral was distinctly in issue in the suit brought to enforce this bond, and the decree commanded the St. Louis Company to execute a deed to us, not only for the ground itself, but for its mineral contents, as a distinct portion of the property which was to be conveyed. By reference to the deed ordered to be made, it will readily be seen the mineral was a part of the property conveyed, and was contained in the description clause of the deed, and was not simply a part of the general *habendum* and *tenendum clause* usually found in the mining deed.

The principal controversy in the Specific Performance Case having been over the right to the mineral, and the whole of it contained in the Compromise Ground, and that case having been appealed to the Supreme Court of the State and there affirmed, (See 23 Mont. 311) and afterward carried by appeal to the Supreme Court of the United States and again affirmed (See 171 U. S. 650), we had supposed that the right of the plaintiff in error to all ore in the Compromise Ground was forever settled and set at rest, as between these parties. This conclusion received added strength from the fact that the second conclusion of law as found by the Court, and the judgment rendered therein, was a perpetual injunction barring the St. Louis Company from all interest or claim to the said premises or to any part or portion thereof, or the possession of the same or any thereof. But your Honors held that to give this phraseology, the effect which we were claiming for it, the words of the contract (i. e. bond)

would, under the circumstances, need to be clear and explicit, and, that the words, *"together with all the mineral therein contained,"* were not sufficient. You had previously stated the rule that should govern the interpretation of this contract, was to ascertain what was the intention of the parties at the time when it was made, and that when such contention was ascertained, it was controlling. For the purpose of showing what were the circumstances surrounding the parties at the time of the execution of the bond, defendant had caused to be subpoened as witnesses, William Robinson, the discoverer of the Nine Hour Claim, Frank P. Sterling, Warren DeCamp and others to show the exact facts and circumstances attending the execution of said bond. That there was between the west side line of the Nine Hour and the east side line of the St. Louis, as the same were originally located, a clear strip of unclaimed territory, approximately 25 feet in width at one end and 50 feet at the other; that the southeast corner stake of the St. Louis Claim had been surreptitiously removed from its original position, to a point well up toward the east side line of the Nine Hour; that when the St. Louis Claim was surveyed for patent, the survey started from the northeast corner stake of the St. Louis, which stake had not been moved, and was run in a direct line for the stake which had been wrongfully placed up on the Nine Hour Claim, and which was marked, "southeast corner of St. Louis Mining Claim;" that said line was continued in the same direction until it reached corner No. 2 of the St. Louis

Claim, where a monument was erected to mark said corner, and no stake, monument or corner of any kind had ever been there before; that the line between corner numbered 2 and 3 of the St. Louis survey came within 10.6 feet of the center of the Nine Hour Discovery Shaft. That if the line between corner 1 and 2 had been continued in its own direction, it would have included within the surface boundaries of the St. Louis, the Nine Hour Discovery Shaft; that the area of the Nine Hour surface thus wrongfully included in the St. Louis surface boundaries was 1.98 acres; that as originally staked, there was not a foot of the Drum Lummon vein within the surface boundaries of the St. Louis Claim, and that by the wrongful extension of its eastern side line as aforesaid, it got approximately 600 feet of the apex of that vein within its boundaries; that at the time of and prior to the execution of the bond, it was distinctly understood and agreed that the west line of the Compromise Ground was to be an absolutely vertical line, and that all east of it, was to belong to the Nine Hour, and all west of it to the St. Louis; that it was distinctly agreed between the parties before the execution of said bond, that the owners of the Nine Hour Claim were to have all of the mineral found to the eastward of said line without regard to where the apex of the vein might be in which said mineral was found; that all of the parties, both obligor and obligees, agreed that the words, "together with all the mineral contained therein," effected this purpose; and that but for this, and but for his belief that these words con-

veyed to him and his co-owners absolutely, every ounce of mineral contained in said ground, the said William Robinson would not have accepted said bond, and would not have dismissed his Adverse Suit and proceedings in the United States Land Office. The Court below would not permit this proof to be made, holding that the language, "together with all of the mineral therein contained," had been construed by this Court in the opinion found in the 102 Fed. Reporter, and were therein found to be meaningless, neither adding to nor taking away anything from the bond, and that the proof offered was therefore irrelevant and immaterial.

Another new feature of the case, not developed on the former trial, is the course or strike and the dip of the Discovery Vein of the St. Louis. It is conceded that the discovery point of the St. Louis was at what it denominated the sixty-five foot shaft, and that the vein therein shown is the discovery vein. The overwhelming preponderance of the proof is that this vein passes out of what is denominated the east side line of the St. Louis Claim at a point near where the plaintiff draws down its 520 foot plane, and at the other end it terminates in the fissure upon which the Transcontinental Tunnel is driven, or, if it continues beyond that, it is found in a small fissure appearing in said tunnel on its southwest side, about ten or twelve feet, westerly from the point where the drift from the sixty-five foot shaft intersects said tunnel. If this fissure is a continuation of the Discovery vein of the St. Louis, it is entirely undeveloped, and a very slight

change in the strike of the vein, as shown between the Transcontinental Tunnel and the sixty-five foot shaft, would carry it across the westerly side line of the St. Louis, and make the side lines, so-called, the actual end lines of the claim.

The St. Louis claims that the vein shown in its southerly drift from the Transcontinental Tunnel is the same vein as its Discovery vein, and that there has been a faulting and throw of the vein, of ninety-five feet. This theory is negatived by the fact that no drag is found in the talc seam, or selvage in the Transcontinental fissure, and the further fact that in going about fifteen or twenty feet further into the tunnel, the contact between the granite and slates is found on the right hand, or southerly side, of the tunnel, and it is fifteen feet from the point opposite until the same contact is encountered on the left, or northerly side of the tunnel. Evidence of movement is found on the walls, and the throw of fifteen feet is exactly in the opposite direction from that claimed by the St. Louis Company. The throw as shown by the contact, corresponds in distance and direction to the throw which must have occured, if the little fissure found on the south westerly side of the Transcontinental Tunnel is a part of the St. Louis discovery vein as already mentioned.

There is absolutely no controversy as to the fact that the vein shown in the sixty-five foot shaft is the St. Louis Discovery vein; that if it extended so far, it would cross out of the St. Louis surface boundaries at about the point where it has drawn down its so-called 520 foot

plane, and as to the course or strike of the vein between its most easterly point of development, and the point where it intersects the fissure upon which the Transcontinental Tunnel is driven. At this point it either terminates or, if it continues further, it is found in the small fissure already referred to. In dip it is almost vertical, sometimes slightly dipping to the east and in other places slightly to the west, so that whether it extends beyond the Transcontinental Tunnel, or does not, it would be physically impossible for it to have extra-lateral rights in the Nine Hour, or in the Compromise Ground, in the territory where the St. Louis Company claims extra-lateral rights for the Drum Lummon vein found within its surface boundaries.

Another feature appearing on this record and which did not, at least, so clearly, appear on the former record, is the fact that in the Adverse Claim Suit there was an area of 1.98 acres involved, of which the Compromise Ground was a part, and that in the settlement resulting in the bond for a deed, the Nine Hour people only secured about a twelfth of the ground to which they claimed to be justly entitled. In the opinion rendered on our writ of error, 102 Fed. 430, your Honors seemed to be of the opinion that the Compromise Ground embraced the entire area involved in the Adverse Claim Suit, and great stress was laid upon that feature. It was not perceived how the owners of the Nine Hour, could have obtained any greater rights by the Compromise, than they would have had if the adverse action had gone to trial and resulted in a judgment in their favor.

On the subject of damage, and as tending to show strongly and clearly the oppressive and outrageous character of the verdict, and the judgment standing against us, the business books of the plaintiff in error were introduced in evidence, and an abstract of them from Nov. 1st, 1898, to May 1st, 1899, the period when the ores claimed by the St. Louis Company, were mined and milled, appears, in the record, as "Defendant's Exhibit J". As tending to show still further the excessive character of this verdict, this record shows the amount of ore worked, and of bullion received for each period of six months, from 1893 to 1898 inclusive.

There are other new features of minor importance, but it is not deemed essential to set them out in our statement of the case. Otherwise the facts are substantially the same as when the case was here before. These are found so fully stated in the two opinions rendered and in briefs of counsel on file, that it would probably serve no purpose to attempt to set them out at length again.

For a reversal of the judgment and for such further relief as this Court may find us entitled to, we will rely upon the following assignment of errors:

ASSIGNMENT OF ERRORS.

I.

The witness Wm. Mayger having testified that the original location of the St. Louis Lode was at the point marked on the map (Plaintiff's Exhibit 1.) as the 65 foot shaft and that a vein was connected with that original discovery.

Whereupon the witness was asked the following question:

Q. "Which direction does it run?"

To which said question the defendant objected on the ground that the same was irrelevant and immaterial, and the court erred in overruling said objection for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relating to the strike or dip of the discovery vein.

II.

The court erred in permitting the witness William Mayger to testify as to the ground which had been stoped out by the defendant northerly of the 133 foot plane, and to point the same out to the jury on the map (Plaintiff's Exhibit 1). The witness having testified that the ground between the planes, from the surface down to the 190 foot level of the Montana Company had been stoped out by the defendant was asked this question, to-wit:

Q. "Point out to the jury northerly of the 133 foot plane where the stopes have been taken out?"

For the reason that the same was and is irrelevant and immaterial, because the stoping he was so required to testify about, was between plaintiff's 133 and 108 foot planes as shown on this map (Plaintiff's Exhibit 1) and between said points the plaintiff did not have the whole of the apex of the said Drum Lummon vein within the surface lines of its claim and it had no right to take the said vein on its strike beyond the west line of the Compromise Ground, or to take any portion of the surface of said Compromise Ground, and the court erred in admitting in evidence over defendant's objection testimony as follows:

(a) In permitting the witness, William Mayger, to testify, as follows: "The entire vein is stoped out between the 108 and 133 foot planes, from the surface to the 190 foot level of the Montana Company's works."

(b) In permiting the witness Parks to testify as follows: "I have block No. 1, the stope south of the north line of the Montana Company's apex shaft, to the 133 foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise Ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high."

Also the testimony of said witness, as shown by the record with reference to blocks 2, 3, 5, 6, and 7, all of which lie wholly within the Compromise Ground and between plaintiff's so called 108 and 133 foot planes.

III.

The court erred in admitting evidence over defendant's objection of the strike and dip of plaintiff's discovery vein as follows, to-wit:

(a) In permitting the witness, Wm. Mayger, to testify that the St. Louis Discovery Vein ran very nearly parallel with the side lines of the St. Louis, as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end, and within 400 feet of the north end.

(b) In permitting the witness, Walter Proctor Jenny, to testify as follows: "I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and west. Explorations under ground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85 to 90 deg. easterly.

(c) In permitting the witness, John R. Parks, to testify as follows, to-wit: "The discovery vein of the St. Louis is a gold bearing fissure vein, running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental Tunnel."

(d) In the admission of all other testimony, shown in the record relative to the discovery vein of plaintiff's St. Louis Mining Claim, all of such testimony having been admitted over defendant's objections.

IV.

The court erred in admitting all testimony as shown by the record relating to ores mined by the defendant in the Compromise Ground, for the reason that the plaintiff was estopped by the judgment in the Specific Performance Case from claiming any ore, or mineral found within the surface boundaries of said Compromise Ground, and particularly the court erred in permitting the witness, William Mayger, to testify, over defendant's objection that "The entire vein is stoped out between the 108 and 133 foot planes, from the surface to the 190 foot level of the Montana Company's works. I had Professor Parks and Mr. Keerl measure up the stopes taken out by the defendant, and compute the number of tons that had been so taken."

(b) In admitting the testimony of Joseph Wallish over defendant's objections as follows: "I have heard the testimony of Mr. Parks, and heard him speak of testing certain samples. I was present when those samples were taken. The first sample was taken in the Montana Company's Apex Shaft; it was taken from the north easterly portion of the shaft."

(c) In admitting the testimony of John R. Parks, over defendant's objection, and permitting him to testify as follows: "I have block No. 1, the stope south of the north line of the Montana Company's Apex Shaft, to the 133 foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise Ground extended downward vertically."

V.

The witness William Mayger having testified that the plaintiff had workmen on the south end of its St. Louis Claim, on Saturday, the 29th day of May, 1905, developing the foot-wall of the vein, was asked on cross-examination this question, to-wit:

"If that man were at work 78 feet below corner No. 3, and there had been no foot-wall there, will you tell me the width of that apex provided the hanging wall took the course you indicated by your ruler from the 108 foot plane crossing through the Nine Hour shaft?"

Which question was objected to by the plaintiff, and the court erred in sustaining such objection, for the reason that the same was proper cross-examination as tending to develop the knowledge of the witness and his interest in the litigation.

VI.

The court erred in admitting in evidence a certain map of the St. Louis Mining Claim, and in permitting blue print copies of the same to be given to each of the jurors. The only authentication of said map being that the witness William Mayger on his redirect, upon being shown the map by counsel, testified that generally speaking it represented as far as he knew anything about it, the general situation, but that he did not know who prepared the map or the map of which it was a copy. That it was a fair enough illustration except that according to his idea, there was not so much throw of the dis-

covery vein on the fault line, and that the two ends ought to be nearer together and that a line ought to be a little bit higher up, otherwise it was all right.

VII.

The court erred in permitting the witness, William Mayger, to answer the following question relating to said map, to-wit:

Q. "I will ask you if that bears a general resemblance of the general situation of the Drum Lummon Mining Claim to the rest of the property?"

For that the question was leading, immaterial and irrelevant.

VIII.

The court erred in admission of evidence offered by the plaintiff in the following instances, to-wit:

(1) The witness John R. Parks having testified that himself and Mr. Keerl made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed, was permitted to testify over defendant's objection as to ore removed between the 108 and the 133 foot planes and ore lying wholly within the surface boundaries of the Compromise Ground.

(2) The said witness having testified that he had divided the stoped ground into eleven blocks lying north of the 133 foot plane down to the 190 foot level in the defendant's ground, was required to take the blocks and tell the tonnage and value he found in each block over

the objection of the defendant. For that it included blocks in the Compromise Ground, which by the judgment and decree in the Specific Performance Case, was found to be the property of the defendant, and because they were not within the recovery period under the pleadings in the action, in that a portion thereof at least was taken out since September 16th, 1893, and also because the recovery for ore extracted after September 16th, 1903, is limited by the supplemental pleading.

(3) The court erred in permitting the witness Parks to testify to what he denominated block One being the ground south of the north line of the Montana Company's apex shaft to the 133 foot plane from the surface to the instrument at K. and containing 410½ tons of the value of $59,522.50.

(4) The court erred in permitting the said witness Parks to testify with reference to the cubical contents and value of each of the blocks, numbered 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason as already assigned.

IX.

The court erred in not permitting the witness for the defendant, John H. Farmer, to answer the following question, to-wit:

Q. "Drawing a line at right angles to that one (indicating the east line of the Compromise Ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is from the center of the discovery shaft on the Nine Hour and

at right angles to the line between corners 2 and 3 on the St. Louis?"

Said witness having testified that he was a mining engineer and had made the map (defendant's exhibit E) about which he was testifying.

X.

The court erred in refusing to permit the witness John Langan, William Robinson, Warren DeCamp, F. P. Sterling, John W. Eddy and Joseph K. Toole to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

XI.

The court erred in refusing to permit the defendant to call to the witness stand, John H. Farmer, and to prove by him that he had read the complaint in the Adverse Claim Suit, brought by the owners of the Nine Hour against the St. Louis Claim, which complaint is referred to in the complaint in the Specific Performance Case; that he knew the description therein contained and that it represented the area of 1.98 acres. That he had platted the area in conflict on the map, (Defendant's Exhibit E), and that it included the 30 foot strip or the Compromise Ground.

XII.

The court erred in sustaining the objection made by plaintiff and in refusing to permit the defendant to prove

by the witness William Robinson, present in court, that he was the person who located the Nine Hour Claim and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (defendant's Exhibit E); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim Suit from his co-owner DeCamp, was that he was to retain the right to the ore beneath the Compromise Ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants were to have the 30 foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties before the bond (Defendant's Exhibit A) attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and enquired of him whether the obligor in said bond could pay the penal sum named therein, and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owners all of the mineral contained in said Compromise Ground regardless of where the

lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line. That after his discovery, the south east corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit E). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim, was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said Nine Hour Claim embraced within such line, save and except the 30 foot strip.

XIII.

The court erred in refusing to permit the defendant to call Warren DeCamp and to establish by him that he was a co-owner in the Nine Hour Claim at the time that the Adverse Claim Suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the

Nine Hour were to have the 30 foot strip, together with all of its mineral contents regardless of where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XIV.

The court also erred in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness stand and in refusing to permit the said defendant to prove by said Sterling that at the time (Defendant's Exhibit A) attached to defendant's answer herein, was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between the owners of the Nine Hour, and of the owner of the St. Louis, at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30 foot strip or Compromise Ground, and that the owner or owners of the St. Louis should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn

up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the Compromise Ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XV.

The court erred in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse Suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise Ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond, but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

XVI.

The court also erred in sustaining the objection made by the plaintiff to the calling of John Langan, then in court, to the witness stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located and where the west line

of the Nine Hour was located, and that he knew that there was a vacant space of uncleared ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XVII.

The court erred in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit A) attached to its answer, was in his hand writing; that the words, "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time that said bond was drawn.

XVIII.

The court erred in refusing to receive the original bond (Defendant's Exhibit A) attached to its answer, in evidence, the defendant offering to show that said bond was in the hand writing of Governor Joseph K. Toole, who witnessed the instrument.

XIX.

The court erred in refusing to permit defendant to read in evidence the original complaint, and the replication in case No. 2798, Old Series of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, wherein William Robinson, et al, were plaintiffs, and Charles F. Mayger was defendant, being the Adverse Claim Suit referred to in the record in the Specific Performance Case, for the purpose of showing that the

area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit E.

XX.

The court erred in granting the plaintiff permission to amend the *ad damnun clause* of its complaint so as to change the $50,000 therein mentioned to $400,000. Such amendment not being necessary in order to make the pleadings correspond with the proof, and the same depriving the defendant of substantial rights.

XXI.

The court erred in overruling and denying defendant's motion to direct a verdict in its favor.

XXII.

The court erred in its charge to the jury in telling them in the preliminary portion of its charge that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefor no further reference is made thereto."

XXIII.

The court erred in its charge in giving to the jury its instruction Number 5, which said instruction is as follows, to-wit:

> "The plaintiff must show a right of recovery. This applies as well to the question of extra-lateral rights on the Drum Lummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a prima facie case by its

evidence, and the presumptions of law applicable to the situation, that it has extra-lateral rights to its discovery vein, between the 520 and the 133 foot planes, and therefore to that part of the Drum Lummon vein in dispute, then the defendant must overcome this prima facie case and these presumptions by *showing to the satisfaction of the jury* that plaintiff has no extra-lateral rights."

XXIV.

The court erred in charging the jury as in its instruction No. 8, which said instruction is as follows, to-wit:

"If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location. And I further charge you that the burden is upon the defendant to overcome this presumption *to your satisfaction.* It is not necessary, in order to give plaintiff extra-lateral rights on that part of the Drum Lummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133 foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXV.

The court erred in its charge to the jury in giving its instruction No. 17, which is as follows, to-wit:

> "If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass can not be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXVI.

The court erred in its charge to the jury in giving to the jury its instruction No. 18, which said instruction is as follows, to-wit:

> "The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person except

those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXVII.

The court erred in its charge to the jury in giving its instruction No. 19, which is as follows, to-wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extra-lateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the wilfulness of the trespass, had it been comitted upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXVIII.

The court erred in its charge to the jury in giving to said jury its 20th instruction, which is as follows, to-wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133 foot planes,

and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrong-doer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXIX.

The court erred in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to-wit:

"As to the evidence disclosed by the books of defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value of the ore extracted from the Drum Lummon vein, you must be satisfied that the ores taken from other parts of defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXX.

The court erred in giving to the jury its 23rd instruction, which is as follows, to-wit:

"The law is well settled that if one wilfully places the property of another in a situation where

it can not be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated.''

XXXI.

The court erred in its charge to the jury by giving to the jury instruction No. 32, which is as follows, to-wit:

> ''In considering any ore extracted from Block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed, deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge.''

XXXII.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No.1.

> ''The defendant having heretofore and on or about the 1st day of June, A. D. 1905, recovered a judgment and decree against the above named plaintiff in the District Court of the First Judicial

District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise Ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning, as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise Ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise Ground, or to any part or portion thereof, or to the possession thereof, or of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all mineral contained in said Compromise Ground, whether the leads, lodes, or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise Ground, you will not take the same into your consideration or return any verdict therefor.

The court instructs you that in order to entitle a miner to follow a vein or lode having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133 foot planes, it has only a part of the top or apex of the Drum Lummon Lode within its surface boundaries. The court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein

on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133 foot planes."

XXXIII.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 11, which said instruction is as follows, to-wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title, or interest in and to the Compromise Ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is, therefore, not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXXIV.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to-wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1905, in an action then

pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral, and such mineral only, as was, or is, found in leads or lodes having their tops or apices wholly within the surface boundaries of the said Compromise Strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise Ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's rights to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise Ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXV.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to-wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extra-lateral pursuit of a vein having its top or apex

within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extra-lateral right on the Drum Lummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extra-lateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drum Lummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXVI.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to-wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

XXXVII.

The court erred in refusing to instruct the jury as

requested by the defendant in its instruction No. XXI., which said instruction is as follows, to-wit:

"As I have already explained to you, plaintiff's extra-lateral rights on the Drum Lummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extra-lateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that vein in its course downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface. For illustration, suppose that the plaintiff in this case, had only, one hundred feet of the apex of its Louis Claim within the surface boundaries of its claim, and that it was so situated with reference to the Nine Hour Claim, that on its dip downward and under the surface of that claim it would have extra-lateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental Tunnel or fissure, then plaintiff's extra-lateral rights on the Drum Lummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the North

easterly drift driven by plaintiff from the bottom of its sixty-five foot shaft, then you would be authorized to draw an imaginary line from said point to the Drum Lummon vein, at right angles to the general course or strike of said Drum Lummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extra-lateral rights on the Drum Lummon vein. Then should you further find, from a preponderance of the testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental Tunnel, or fissure, then a line drawn at right angles to the general course of the Drum Lummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extra-lateral rights in said Drum Lummon vein, no matter how much further to the southward the whole, or a part, of the apex of the Drum Lummon vein may be found within the St. Louis Claim."

XXXVIII.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to-wit:

"If you should find from the testimony that the vein in the sixty-five foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental Tunnel, and that the vein found in the sixty-five foot shaft passes through the fissure shown in the Transcontinental Tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes

out of the south end line of its claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental Tunnel at a point a little westerly of the point where the vein from the sixty-five foot shaft intersects said tunnel, is the same fissure as that in which the vein in the sixty-five foot tunnel is found, but that it only extends into the wall of the tunnel for a few feet, and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental Tunnel as practically the southerly end of plaintiff's said discovery vein and your verdict should be for the defendant."

XXXIX.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI., which said instruction is as follows, to-wit:

"The court instructs you that your first duty is to examine and ascertain what, if any, extra-lateral rights attach to the discovery vein of plaintiff's St. Louis Claim. In the first place, you must ascertain which of the surface lines are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practicaly parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65 foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St.

Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which it first discovered, and upon which it made its location, was substantially parallel to the easterly boundary line of its claim, before you would be justified in awarding its extra-lateral rights on the Drum Lummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extra-lateral rights within or under the Nine Hour Claim, and extra-lateral rights could not be claimed for the Drum Lummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drum Lummon lode found within their surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis Claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extra-lateral rights under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this court nor this jury can correct. Mr Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein and not across it."

XL.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to-wit:

> "It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise Ground, or the thirty-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise Ground is to be regarded as standing exactly on the same plane, so far as priority is concerned with every other part of the St. Louis Claim."

XLI.

The court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII., which said instruction is as follows, to-wit:

> "Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis Claim was prior to the Nine Hour,

does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis Company to follow the vein to depth in this action must be limited by what is called the 108 foot plane, or the departure point of the hanging wall and that there can be no revovery in this case for any ores extracted south of the 108 foot plane."

XLII.

The court erred in giving to the jury its instruction No. 7, which said instruction is as follows, to-wit:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520 foot plane and the 133 foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis quartz lode mining claim is not entitled to extralateral rights on the Drum Lummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary, or incidental, vein of the St. Louis Claim. Under the Statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface

lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. These extra-lateral rights, under the decisions of the Supreme Court of the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extra-lateral rights upon its discovery vein, including that portion of the St. Louis claim within the above planes in which is found the apex of the Drum Lummon vein, so called, then plaintiff has extra-lateral rights upon that part of the Drum Lummon vein. Plaintiff claims that the original or discovery vein of the St. Louis claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claims. If you find from the evidence that the original or discovery vein of the St. Louis claim, on its course or strike, passes through the earth within the limits of its surface boundaries, between the 520 and the 133 foot planes, on a general course lengthwise of the claim, then plaintiff has extra-lateral rights to such parts of the original discovery vein between said planes, and would have corresponding extra-lateral rights upon any secondary or incidental veins having their apexes in the St. Louis between said planes."

XLIII.

The court erred in giving to the jury its instruction No. 9, which said instruction is as follows, to-wit:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) run lengthwise of the St. Louis claim between its side lines and extend

from the 520 to the 133 foot planes, and dip easterly, then plaintiff would be entitled to extra-lateral rights for that vein (or those veins) and to the like extra-lateral rights for all other veins having their apices within the same limits, and running in the same general direction."

XLIV.

The court erred in giving to the jury its instruction No. 11, which said instruction is as follows, to-wit:

"There are two rules established and adopted by the Federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon whether or not the trespass under which the ore was extracted, was wilfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drum Lummon vein which apexes in the St. Louis quartz lode mining claim, between the planes aforesaid, and extracted the said ore therefrom wilfully, recklessly and with knowledge that said vein did apex within the said St. Louis claim then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not wilful and the plaintiff is entitled to the value of the ore, subject to the deduction for the reasonable cost of mining of said ore, hoisting the same to the surface, transporting the same to reduction works and the reason-

able cost of such reduction. The actual cost to the defendant of all, or any, of those items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater then the reasonable value of the items above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted undr an honest belief that it owned the ore in question and had a right to remove it, was merely for the purpose of reducing the damages which it would have to pay for such ore upon a suit to recover the value thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was wilful."

XLV.

The court erred in giving to the jury its instruction No. 14, which said instruction is as follows, to-wit:

"The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict, you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership, and given evidence to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show, if it can, that the trespass complained of was not wilful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's mining claim, by the

defendant, that the trespass was wilful and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the defendant to show in mitigation of damages that it was not a wilful trespasser and thus be relieved from payment of the value of the ore as stated in other instructions herewith given to you."

XLVI.

The court erred in giving to the jury its instruction No. 15, which said instruction is as follows, to-wit:

"If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrong-doer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured."

XLVII.

The court erred in giving to the jury its instruction No. 16, which said instruction is as follows, to-wit:

"In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury in de-

> termining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted."

XLVIII.

The Court erred in requiring the defendant to submit its exceptions to the charge of the Court in writing, before the going out of the jury, and in the presence of the jury, the same being contrary to Rule No. 58 which is as follows, to-wit:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

XLIX.

The court erred in inserting into the defendant's bill of exceptions on the settlement thereof, the exceptions in writing hastily made and filed before the going out of the jury, the same not having been proposed as an amendment by the plaintiff to defendant's proposed bill of exceptions.

L.

The Court erred in refusing to allow the exceptions to the charge of the Court given to the jury, as in defendant's proposed bill of exceptions and in cofining the exceptions of the defendant to the exact language used by it in the written exceptions filed before the retirement of the jury.

ARGUMENT.

THE LAW OF THE CASE.

The first question that confronts us is whether the two opinions of this Court, formerly rendered, and already referred to, are the ''law of the case'' and are to control absolutely the determination of the rights of the parties here, as they did in the court below. Nothing seems to us to be clearer than that it was the intention of this court to relieve the case of this doctrine, by its judgment of Oct. 8th, 1902 and by the remittitur issued in pursuance of that judgment. Both of the judgments formerly rendered were VACATED AND SET-ASIDE. ''and that in lieu thereof, it is ordered and adjudged that the judgment of the said Circuit Court in this cause, be and the same is hereby reversed with costs, and the cause remanded to the said Circuit Court for a new trial.'' That this court intended by this language, to set the case at large, and to relieve it absolutely from the doctrine of the ''law of the case,'' would seem to us too clear to admit of any argument. This is still further emphasized in

the language of the remittitur which issued out of this Court. Its command to the Circuit Court is, to try the case "according to right and justice, and the laws of the United States." In not being guided by this plain injunction of the writ, and in referring every legal question, or questions of fact, to what was decided or found by this Court, as shown by the two reported opinions, we think the court below committed manifest error. Nor, in our opinion, did the District Judge do his duty toward this Court, by thus abrogating his functions as a court of justice, and referring all such questions for determination to the printed opinions; the judgments supporting which, had been set-aside. It is well known that the present District Judge has had a long experience in dealing with questions of mining law, both on the District and Supreme benches of the State of Montana, and it would have only been respectful for him to have given this court the benefit of his wide experience in this branch of the law. His independent, unbiased judgment upon the novel and difficult propositions involved in this case, could not have been otherwise than helpful to this Court, and that without regard to whether this court agreed or disagreed with him, as to their proper solution.

The judgment rendered in the case reported in the 102 Fed. affirming the judgment of the Circuit Court, and the one in the 104 Fed. reversing that judgment, have both been vacated and set-aside, expressly by the judgment of October 8th, 1902, and therefore their effect as an estoppel has been destroyed. The opinions ren-

dered are the reasons given for the judgments then ordered, and are therefore not conclusive upon this Court as the "law of the case" and were not conclusive upon the Circuit Court.

> 2 *Black on Judgments,* Sec. 511.
>
> 1 *Wharton on Evidence,* Sec. 781.
>
> *French vs. Edwards,* 4 Savg. 125.

> "On the reversal of a judgment at law, therefore, the theory of the law is that the parties are placed *in statu quo,* and are to be considered as if the judgment had never been rendered."

> *Tarleton vs. Goldthwaite's Heirs,* 58 Am. Dec. 296-298.
>
> *MacTielton vs. Love,* 54 Am. Dec. 449.
>
> *Stearns vs. Aguirre,* 7 Cal. 443.
>
> *Phelan vs. San Francisco,* 9 Cal. 15.
>
> *Argenti vs. San Francisco,* 30 Cal. 463.
>
> *Heidt vs. Minor,* 113 Cal. 385.

> "It is the law of the case in the most exact and resrticted sense in which it can be claimed that the doctrine of *res judicata* should have application, for it is not the reasoning of the court, nor any mere legal principle announced, but the judgment itself which is relied on as conclusive of the questions in controversy."

> *Lucas vs. City of San Francisco,* 28 Cal. 595.

We have consulted many cases in which the doctrine of the "law of the case" has been declared and enforced, but we have not been able to find a single one in which

the doctrine has been applied, where the judgment which gave the opinion force and vitality, had been revoked and set-aside.

The judgment by virtue of which this case was remanded, was the judgment of October 8th, 1902, and this was a simple judgment of reversal of the judgment of the Circuit Court, and a remand of the case for a new trial. Under these circumstances it is well settled that the doctrine of the "law of the case" does not apply.

> "When the decree was reversed and the case remanded generally, without any specific directions to the lower court, that court was not required to proceed according to the opinion of the Appellate Court, but it had authority to permit a change in the pleadings and to hear the cause *de novo.*"

Lang vs. Metzer, 69 NE. 493-497. Citing.

Chickering vs. Failes, 29 Ill. 294.

Parker vs. Shannon, 121 Ill. 452.

Perry vs. Burton, 18 NE. 653.

Cable vs. Ellis, 11 NE. 188.

West vs. Douglass, 34 NE. 141.

Russell vs. Rush, 48 NE. 990.

> "Where two conflicting opinions are delivered in the same case at different times and it is brought up a third time on error or appeal, neither one of the previous decisions is conclusive, but the case must be considered as if presented for the first time."

Moore vs. Barclay, 23 Ala. 739.

> "On a former trial of this case on appeal, reported in 5 Col. 341, the opinion reversing the case,

holds the law different from what we have laid down and we cannot and will not assent to the view therein expressed. The doctrine of a former adjudication can have no application to this case, as it was a simple reversal of the judgment of the court below, for reasons therein stated; but no judgment was given for the one party or the other except that of reversal, and what the law fixed as a consequence, the costs of court. The judgment of reversal is conclusive that the case was reversed but of nothing more.''

Bynum vs. Apperson, 9 Heisk. (Tenn.) 623-644.

''But to give the binding decision these conclusive qualities, it ought to be explicity declared, and perfectly understood, and, to become the ''law of the case,'' it ought definitively to settle the rights of the litigant parties.''

Hammond Lessees vs. Inloes, 4 Md. 138-165

''But if this is the same case as that formerly before the court, it is a misnomer to call the opinion and a simple judgment of remand for a new trial *res adjudicata.* The opinion delivered may properly control the lower court and would undoubtedly, on the same facts, be entitled to great weight on a second appeal to this court. But the opinion, or reasoning for the judgment is no part of it, and the judgment itself is not final between the parties, and therefore is not conclusive.''

White vs. Downs, 40 Tex. 227.

''Where the court of Appeals reverses a decree and remands the cause without directions, such order is not *res adjudicata* on retrial of the same cause in the County Court.''

Friedman vs. Lesher, 64 NE. 736. Citing.
Livingston vs. Strong, 11 Ill. 152.
Henning vs. Aldridge, 156 Ill. 305-33 NE. 754.
Board vs. Nelson, 44 NE. 743.

"While the rule that an adjudication by an appellate tribunal becomes the law of the particular case on all subsequent trials, is a wholesome rule, and one that should be enforced, yet the rule should be confined to questions that were actually considered and decided, and it should not be extended so as to embrace dicta or intimations contained in an opinion which may be thought to fore-shadow the views of the Appellate Court on other questions."

Patillo vs. Allen-West Com. Co., 108 Fed. 723-729.

The doctrine of the "law of the case" has been carried so far in some instances, notably in California, as that the courts have refused on a second appeal to review their first decision even though it might have been erroneous and contrary to the law as established by subsequent decisions. This ridiculous position, however, is rapidly being overturned, and courts are holding where a case has been in the Supreme Court and sent back for a new trial, though the judgment did not remain binding between the parties whereby subsequent decisions of the same court though not mentioning the particular case in which the original judgment was entered, or professing to overrule it, have subsequently decided to the contrary, that the court is not concluded by its former judgment, but it may, and will reexamine its

former decision and establish the law in conformity with right and justice and the weight of authority. For a very able and exhaustive opinion upon this feature see

City of Hastings vs. Forworthy, 45 Neb. 67.

ALLEGATA ET PROBATA.

Our first assignment of error, raises the question as to the admissibility of proof of material facts not pleaded, and this error, if it be one, is preserved throughout the case by our assignment numbered 111. This was one of the matters which the court below decided against us because, and solely because it had been so decided by this Honorable Court in the case reported in the 102 Fed. We respectfully request the Court to reconsider its former opinion in this respect, if it shall determine that it is not bound by its former opinion. If, in other words it shall agree with us that the opinion heretofore rendered is not the "law of the case" and the question is still at large.

Since the decision of the case of *Walrath vs. Champion Mining Co.,* 72 Fed. 978, by the court, and its affirmance by the Supreme Court 171 U. S. 293, the most important feature of a suit to establish extra-lateral rights on a subsidiary vein, found within the surface boundaries of a mining claim, is the course or strike and dip of the original, or discovery vein. Its strike determines which are the side and which are the end lines of the claim. The right to extra-lateral rights on the subsidiary vein is wholly dependent upon the fact that on the discovery vein the claimant has extra-lateral rights to the same

extent and in the same direction in which he is asserting them for his subsidiary vein. It is respectfully submitted, that since this decision, which is now settled law, it would be impossible to try a case of this character without proof of the strike of the discovery vein. There is no presumption of law, arising from the patent, or otherwise, that the Discovery vein runs in any particular direction or has any particular dip on its descent into the earth. There is no presumption of law that the lines which the miner has denominated his side lines, or his end lines, are in truth and in fact such. That fact is to be determined by the fact of what lines the apex of his Discovery vein would actually cross, if it reached them. It is further respectfully submitted, as a necessary corollary, arising under the decision referred to, that if the discovery vein running toward an end line of his claim, terminates, or dies out before reaching the end line, and that fact appeared from the testimony, his extra-lateral right would terminate at the point where his Discovery vein so terminated.

> *Carson City G. & S. M. Co. vs. North Star M. Co.,* 73 Fed. Rep. 597.

That the law does not contemplate that a miner shall have greater length of vein underground, than he has length of apex on the surface. That this being true as to the Discovery vein, it is equally true as to any subsidiary vein. His rights upon such vein must be absolutely controlled by his rights on the Discovery vein. It would

seem, therefore, that good pleading and correct practice would require the plaintiff in his complaint distinctly to aver the course or strike and dip of his Discovery vein, the essential fact, upon which his rights in his subsidiary vein depends.

In the case at bar, it is true as already found by this court, "that the complaint does not mention the direction of the Discovery vein or its dip" and it might have added that it did not mention the Discovery vein at all. And yet on the trial of this case, without any such allegation, or any allegation of any kind or character which would seem to make such proof revelant, the plaintiff spent days in the trial of this case in trying to prove that its Discovery vein ran substantially parallel to the side lines of its claim, passed through both end lines, and dipped to the east. The defendant on the other hand, without any denial in its answer, which would make such proof relevant, spent other days in proving that plaintiff' s discovery vein crossed the so-called east side line of the claim at a point near plaintiff's 520 foot plane, if it reached that point; that at the other end it terminated, or virtually terminated, at the cross-fissure upon which the Transcontinental Tunnel is driven; that the weak poverty stricken vein which plaintiff calls its Discovery, was not, and could not be, the same vein as the little vein shown in its south drift from the Transcontinental Tunnel.

In no other case that we have been able to find has there been such a radical departure from what we under-

stand to be the correct rule of practice. The inflexible rule of pleading and proof, as we understand it, is tersely stated by Mr. Chief Justice Field in *Green vs. Palmer,* 15 Cal. 411-415, as follows:

> "Second Rule—Those facts, and those only, must be stated which constitutes the cause of action, the defense or the reply."
>
> Therefore, FIRST, each party must allege every fact which he is required to prove, and will be *precluded from proving any fact not alleged."*

We might cite very many authorities in support of this proposition. There can be no doubt that this is a correct statement of the general rule, and no reason is perceived why this particular case should constitute an exception to it.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

We cannot abandon this contention. We must respectfully request this court, to reconsider its former ruling as to the sufficiency of this complaint. In doing so we are not unmindful of the fact, that counsel on the other side are able, ingenious and alert. That the complaint as amended prays damages in the sum of $600,000. and that the verdict of the jury was for $195,000., fabulous sums, when compared with the extent and character of the alleged trespass. Nevertheless, it is our earnest conviction that this complaint does not state facts

sufficient to entitle the plaintiff to recover a single dollar against us. In saying so, we assume that this Court must hold that it was essential that the plaintiff should have alleged the course or strike of its Discovery vein, and that, having failed to do so, its proof, in this particular, was irrelevant. In the absence of any allegation with reference to the Discovery vein, we have but one vein, the Drum Lummon, in the case, and that enters the St. Louis surface through its easterly boundary line, and departs through the same line. The simple question presented, then is, can a vein which enters and departs through the same line have extra-lateral rights? We observe that Mr. Lindley in his valuable work on Mines, (2 Lindley 2 Ed. Sec. 584.) recedes in a measure, from the view taken in the first edition, that under no circumstance could there be any extra-lateral rights attaching to such a location. The proposition is not definitively settled, but we are of opinion that the case of *Catron vs. Old,* 23 Col. 435 is rightly decided and will ultimately be held to be the law.

Probably the best settled proposition that has yet arisen under the mineral Land Act, is, that what are the end lines of a mining claim is to be determined by the course of the lode through a claim. That is an end line which the lode on its strike crosses.

Flagstaff Mining Co. vs. Tarbet, 98 U. S.,463-468.

Iron Silver Mining Co. vs. Elgin M. Co. 118 U. S. 196.

Argentine M. Co. vs. Terrible M. Co. 122 U. S. 478.

King vs. Amy & Silversmith M. Co. 152 U. S. 222.

Del Monte Co. vs. Last Chance M. Co. 171 U. S. 57.

Walrath vs. Champion M. Co. ibid 293-307

Tyler vs. Sweeney 79 Fed. 280.

New Dunderberg M. Co. vs. Old 74 Fed. 606.

To hold that a vein which enters and departs through the same line, could have extra-lateral rights, would be doing violence to this doctrine, and especially is this true when such a vein is the only one within the surface boundaries of the claim.

The principle for which we contend is very clearly stated by a judge who has had a very wide experience in the determination of questions arising under the Mineral Land Act as follows:

> "The defendant's contention seems to be that because they claim they have subsequently discovered the apex of a lode running northerly and southerly, at the easterly line of their surface location, they have a right to follow the lode on its dip underneath the Cosmopolitan claim, without regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location and find out what the defendant Foote located; because, if he located on a lode that he thought had a northerly and

southerly course, and made his location accordingly, and the subsequent developments proved that the locater was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his right by the facts as they are shown to exist, instead of what he thought existed at the time the location was made.''

Cosmopolitan M. Co. vs. Foote, 101 Fed. Rep. 518.

In this case, the Cosmopolitan case, the court found from the testimony that the discovered lode ran more nearly in an east and west direction through this claim, than it did in a north and south direction, and for this reason refused to give the defendant extra-lateral rights under the Cosmopolitan surface.

The question as to whether a vein which enters and departs through the same boundary of a mining claim, can have extra-lateral rights, is one of much importance to the miner. It is not unusual to meet exactly the conditions which are presented by the complaint in this action. It is one almost undecided, since *Catron vs. Old, Supra,* is the only authority to be found on it. While we think the case is right on principle, we recognize the importance of setting it at rest.

The most remarkable feature of this complaint, is found in the fact that after describing with painful particularity, the St. Louis Claim, by metes and bounds, it excepts from the area thus described, the *Compromise Ground,* ''together with all the mineral therein contained,'' and as to this, it avers that we are the owners of

it. Here is a disclaimer of any right in the Compromise Ground, or to its mineral contents on the part of the plaintiff, a clear and unequivocal averment that the St. Louis Company, does not own it, and yet here is a judgment of $195,000, for what they have alleged belongs to us. This is alleged not simply as a recital, but as a matter of pleading; the acknowledgement of a fact in a sworn pleading. This we say shows conclusively, as a matter of confession on the part of plaintiff, that it has no cause of action.

True, in the fourth paragraph, it is alleged that the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim, is to the east and dips under and beneath the said Nine Hour mining claim including said thirty foot strip, or the Compromise Ground.

It expressly disclaims ownership and possession of the *locus in quo* upon which the defendant's entry was made, "and of all the mineral therein contained.". Against this express disclaimer there is an implication in the complaint itself, more or less strong, of ownership of a limited interest of "ores" in veins, lodes, or ledges within and beneath the previously excepted ground. But if the second allegation were in express and unmistakable terms, that the plaintiff was the owner of that which it had previously disclaimed, the only possible result would be an incurable repugnancy.

"So also, superfluous matter, when it contradicts or is inconsistent with facts before alleged on the same side, vitiates the pleading. This fault falls properly under the

denomination of repugnancy; which as the term imports, is some contrariety or inconsistency between different allegations of the same party.

Repugnancy is a fault in all pleading; and this is the obvious principle, that inconsistent allegations in the pleading, of either party, destroy or neutralize each other. The rule, however, is to be understood with this difference; If the pleading is repugnant on a material point, it is ill in substance or on general demurrer; but repugnancy in an immaterial point is a fault in form only, and therefore no advantage can be taken of it, except by special demurrer. Thus, if in trover, the declaration by mistake alleges the conversion to have taken place on a day prior to that on which the loss of the goods is laid; or if in ejectment, the ouster is laid prior to the alleged date of the lease; the repugnancy in either case, would at common law, (before the Statute of jeofails) have been fatal on general demurrer."

Gould's Pleading (3 American Edit.) Chapter III. Secs. 172-3.

"Again, if a pleading be inconsistent with itself, or repugnant this is ground for demurrer. But there is the exception: that if the second allegation which creates the repugnancy is entirely superfluous and redundant, so that it may be rejected without materially altering the general use and effect, it shall in that case be rejected, and shall not vitiate the pleading; for the maxim is *utile per inutile non vitiatur.*"

Stephen on Pleading, (1 Amer. Edit.) 378.

The case at bar does not fall within the exception stated by Stephen. The "second allegation which creates the repugnancy" is not "merely superfluous and redundant, so that it may be rejected, without materially altering the general sense and effect." It is the most material fact of the plaintiff's seizin and possession. It directly contradicts the former allegation. If it be rejected, it leaves the plaintiff without a cause of action as to mineral tained, it creates an incurable inconsistency with the previous allegation. To the same effect is Chitty. "But a material allegation, sensible and consistent in the place where it occurs, and not repugnant to any antecedent matter, cannot be rejected merely on account of there occurring afterwards in the same pleading, another allegation inconsistent with the former, and which cannot itself be rejected."

> *1 Chitty on Pleadings,* (Sixteenth Amer. Ed.) 255.
>
> *The King vs. Stevens,* 5 East, 254.
>
> *Buckley vs. Kenyon,* 10 East, 142.

What more need be said? The complaint is inartistically drawn, does not state any cause of action, its allegations are repugnant to each other, it is bad in substance and insufficient in law to sustain the judgment. We ought not be required to go any further afield, to insure the reversal of this outrageous and iniquitous judgment.

WHERE MUST WE DRAW THE LINE?

Our second assignment of error presents what is now an absolutely novel question. The only decision of the question was the opinion of this court as reported in the 104 Fed. and since the judgment in that case has been vacated, it is no longer an authority. It has been accepted without dissent, by both Mr. Lindley and Mr. Snyder, in their works on Mines, and has been cited in a number of cases since decided. Nevertheless we respectfully insist that in this respect this court was clearly wrong in its conclusion, and we ask for this important question a most careful reconsideration.

The error complained of has been preserved in our assignment, numbered VIII and XXXV.

It will be seen by reference to the opinion rendered, that it is based entirely upon the proposition that the St. Louis claim having the eldest location and patent, was entitled to the whole of the vein so long as it had any portion of the apex within its surface boundaries, and hence that the line should be drawn at the point where the foot-wall crosses the westerly side line of the Compromise Ground. In so holding, this court entirely overlooked the fact that the Compromise Strip, was patented as a part of the St. Louis Claim, and hence, so far as priority was concerned, it would stand exactly on the same plane as any other portion of that claim. If we go to the notice of location of the St. Louis claim, (Record p. 76) to which the patent relates, we find it was a parallelogram and not the hexagonal figure represented in the patent.

Turning then to the judgment-roll in the Specific Performance Case (Record p. 83) we see that when the St. Louis Claim was surveyed for patent, the easterly side line was wrongfully extended over the Nine Hour claim. The extent of this overlap and wrongful inclusion is conclusively shown by the Nine Hour Patent (Record p. 154) and by defendant's surface map "Exhibit E". This overlap extended westerly from the west line of the Compromise Ground, to the west line of the Nine Hour as originally located, and as to all this territory, the Nine Hour and not the St. Louis was prior in point of time.

We respectfully renew our contention that the words, "*Top or apex*" as found in sec. 2322 of the Revised Statutes, should not be construed as if it read, "top or apex, or any part or portion thereof."

We also respectfully suggest that there is nothing to be found in the case of *Argentine M. Co. vs. Terrible M. Co.,* 122 U. S. 478-484, which warrants this construction. In *2 Lindley on Mines,* sec. 287, will be found a diagram of the several claims involved in this case, and reading the opinion of the Supreme Court in connection with this figure, shows conclusively what was the scope of this decision. This is one of the side-end-line cases, and that is the controlling thought of the entire opinion. True Mr. Justice Field does remark in the outset of the opinion, that "Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the vein first located necessarily carried the right to work the vein." This might be fittingly applied to the

case of a broad apex bisected by a line common to two claims, but could have no application to the point where the boundary plane should be drawn, in the case of a lode crossing a side line of a claim at an acute angle.

In the case at bar, it is manifest that as soon as the hanging wall crosses the westerly line of the Compromise Ground, the plaintiff has not the whole of the top or apex of the Drum Lummon vein, on its side of the line. Proceeding southerly along this line, it has less and less of the apex, until it reaches its 133 foot plane where the foot-wall croses, at which point no part of it is within its boundaries. In order to give it extra-lateral rights between its 108 and 133 foot planes, the court must perforce make the language of sec. 2322 read, "The top or apex or any part or portion thereof."

> "Beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity, a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, THE COURTS CANNOT SUPPLY THE DEFECT. Congress having prescribed the conditions upon which extra-lateral rights may be acquired, a party must bring himself within these conditions or else be content with simply the mineral beneath the surface of his territory."

Del. Monte M. Co. vs. Last Chance M. Co., 171 U. S. 55-66.

We turn aside for a moment to call attention to the

fact that this language is specially applicable to this case. The St. Louis was located nearly two years before the Nine Hour. The locator could then have laid the lines of his claim over the territory afterward taken as the Nine Hour, so as to include the great Drum Lummon vein. He did not do it. He did not get a foot of it within his lines. When he surveyed for patent, he fraudulently included about 600 lineal feet of that vein within his surveyed lines. By another fraud, he succeeded in locating the westerly side line of the Compromise Ground forty instead of fifty feet from the center of the Nine Hour Discovery shaft as called for in the bond. Out of this stolen territory he has got $111,000. He ought to be "content with simply the mineral beneath the surface of his territory."

> "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be who owns the surface."

Del Monte M. Co. vs. Last Chance M. Co., Supra.

There can be no possible controversy on the proposition so broadly and clearly stated. The Mineral Land Act, in so far as it gives extra-lateral rights is an innovation, to say the least of it, upon this fundamental principle of the common law. "No statute is to be construed as altering the common law further than its words import.

It is not to be construed as making an innovation on the common law further than its words import."

Shaw vs. Merchant's Nat'l Bank 11 Otto 557, 25 L. Ed 893.

Sullivan vs. LaCrosse Steam Jacket Co. 10 Minn. 386.

Wilbur vs. Crane, 13 Pick 284.

Dwelly vs. Dweely, 46 Me. 377.

Jasper Trust Co. vs. Kansas City et al R. Co. 42 Am St. Rep. 79.

2. Another and all sufficient reason why the bounding plane must be drawn down from the point where the party has the whole apex, at the 108 foot plane in the case at bar, is the fact that the Mineral Land Act nowhere confers the right to follow a vein on its strike a single inch beyond any boundary line of a mining claim. In this case if the 133 foot plane is to prevail, you take the vein on its strike from the point where the hanging-wall crosses the west line of the Compromise Ground, (plaintiff's 108 foot plane,) to the point where the 133 foot plane intersects the foot-wall. No citation of authorities is necessary to sustain this proposition.

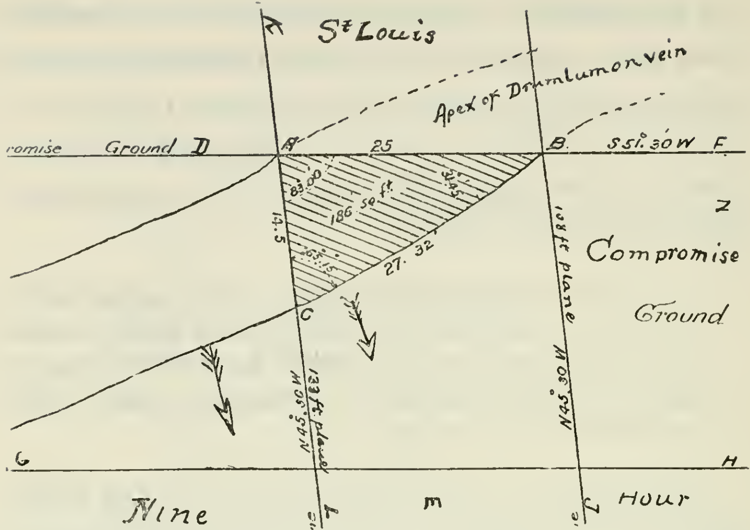
3. In the case at bar you take away from the defendant and give to the plaintiff a triangular portion of the surface of the Compromise Ground, bounded by the west line of the Compromise Ground, the 133 foot plane, and the line of the hanging-wall. In this case you take from us absolutely 168 square feet of our mining claim and give

it to the plaintiff. We submit that there is no provision of law which warrants this, and that it is directly contrary to the constitution of the United States, and the provisions of the Mineral Land Act. The section under consideration, Rev. Stats. 2322 which gives the extra-lateral right, expressly provides:

> "And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

By reference to the patent from the United States, issued to the plaintiff for its St. Louis Claim (Record p. 79) it will be seen that it contains, as do all Mineral Land patents, a reservation in strict conformity with this provision of the law.

We subjoin hereto a diagram showing the angle at which the Drum Lummon Vein crosses the west line of the Compromise Ground; the length for which the vein would be taken on its strike, and the form and amount of the surface which would be taken away from us under the decision of this Honorable Court as reported in the 104 Fed. It is from a photograph of the map (Defendant's Exhibit .....) drawn by the witness Farmer and sworn to by him to be correct and was introduced in evidence on the trial of the case.



The triangle A, B, C, shows distance taken on the strike of the vein, and the surface of the Compromise Ground taken.

The line D. F. is the west line of the Compromise Ground, and the lines G, H, is its East line.

The line I, J, is plaintiff's 108 foot plane, and the line K, L, is its 133 foot plane.

MINOR ERRORS.

Our assignments numbered V, VI and VII relate to obvious errors but of minor importance. This case is too full of great questions, to spend much time on these minor errors. The question asked the witness on cross-examination was clearly a proper one and the court ought not to have sustained the objection made to it.

The map which is the basis of our assignment numbered VI and XII was just as clearly not admissible under

the proof (Record p. 58). Its admission and the passing of blue print copies of it, to the jury was reversible error.

> *Story vs. Maclay,* 3 Mont. 480, affiirmed 4 Mont. 464.
>
> *1 Greenleaf on Evidence,* Sec. 139 and cases Cited.

THE SPECIFIC PERFORMANCE CASE.

The assignments numbered VIII, XXI, XXXII, XXXIII and XXXIV all relate to the effect that should be given to the judgment in the Specific Performance Case (Record p. 81).

We have pleaded this judgment in our answer as a bar. In this case we fought out, to the court of last resort the question of the right to the mineral in the Compromise Ground. It was not only distinctly in issue in that case, but it was absolutely the main issue. We recovered a judgment and decree against the St. Louis Company in the District Court of Montana for the County in which the property here in controversy is situated, which awarded us the mineral contained in that ground without any qualification, or limitation whatever. If this judgment or decree was too broad, if it should have been limited to such mineral as was or might be found in veins having their apex wholly within the surface boundaries of the Compromise Ground, or if it should have excepted therefrom such mineral as was found in leads, lodes, or ledges, having their tops or apices in whole or in part within the surface boundaries of the St. Louis Claim,

it is sufficient to say that this reservation and this exception are not found in this decree. In this case and at the time this decree was made, the St. Louis Company was represented by as able, shrewd and careful lawyers, as were to be found in the State of Montana or in any other state of the Union. If this reservation, or this exception might properly have been included in this decree, it would have been there, beyond the preadventure of a doubt. It was not there and it was not put there, because we had fought that question to a finish and had shown the court that we were entitled to a deed, not only for the Compromise Ground, but for every last ounce of mineral it contained; that by express agreement the west line was an absolutely vertical line, and that we were entitled to everything lying east of it without regard to whether it was rock, sand, ore, mineral or what not. And that is the decree and the only decree that the court made, or could have justly made, under the testimony; and it not only made this decree, but it granted us a perpetual injunction restraining the St. Louis Company from ever asserting any claim to any interest in this ground or to any part or portion thereof. (Record p. 103). Whatever may be the claim as to the inclusiveness or ambiguity of the words "together with all minerals therein contained" in the original bond, it is very clear that when these words were put in the decree, even had they not been accompanied by a perpetual injunction precluding any claim of any kind within the bounded area, these words acquired a fixed, certain and definite mean-

ing, and without the injunction, but certainly with it, operate to award us every particle of mineral in this ground. That this is the undisputed meaning of such language in a decree seems to be absolutely determined by the case of *Bogart et. al. vs. Amanda etc., Mining Co.,* 74 Pac. 882, in which case, upon a bond not so favorable in its provisions, given likewise to settle an adverse claim, and followed by a specific performance suit, it was conceded on all sides that the decree, containing substantially this very language, meant precisely what we claim the language in this decree must mean. And it was insisted that because the decree operated, as we claim this decree must operate, it was erroneous as not warranted by the bond.

Our specific performance case was carried to the Supreme Court of the State and there affirmed, 20 Mont. 394, then carried to the Supreme Court of the United States, and again affirmed 171 U. S. 650. Now after having had a strenuous controversy of this kind, we come into court and plead this judgment as a bar to an action to recover damage for identically the same mineral, that has been adjudged by a court of competent jurisdiction to be our property and not that of the St. Louis Company, and it does not seem exactly right to have the court tell the jury in two lines of his charge, that our plea is unimportant and no further reference will be made to it. It seems as if we would be justified in feeling somewhat aggrieved if, after such a controversy, and in the face of such a judgment, this defendant in error, could collect a judgment of

$195,000 for mineral which had been thus solemnly declared to be our property. It certainly over-rules and sets at naught a long line of very respectable authorities. Whether this is the "law of the case" or not, we insist that the judgment in the Specific Performance Case is absolutely conclusive of the rights of these parties in the present action, and there is no possible escape from it.

2 Black on Judgments, 503-5.

Since the decision of the celebrated case of the Duchess of Kingston, the doctrine has been as stated and approved by the Supreme Court of the United States,

> "That the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court."

Cromwell vs. Sac. Co., 4 Otto 351, 24 L. Ed. 198.

In order to make the former judgment a bar, it must be pleaded, not merely given in evidence.

Freeman on Judgments, 284. and cases cited.

The judgment or decree of a court of competent jurisdiction upon the merits, concludes the parties and privies to the litigation, and constitutes a bar to any new action or suit, involving the same cause of action, either before the same or any other tribunal.

Casey vs. Pennsylvania Asphalt Pav. Co. 109 Fed. 744.

New Orleans vs. Citizens Bank, 167 U. S. 371.

Ball vs. Trenholme, 45 Fed. 588.

Same Case affirmed, 114 Fed. 189.

Ala. *Tunkersey vs. Pettis*, 71 Ala. 189.

Ariz. *Reilley vs. Perkins*, 56 Pac. 734.

Fla. *Hoon vs. Felkel*, 7 Fla. 44.

Ill. *Stickney vs. Gourley*, 132 Ill. 213.

Ky. *Wallace vs. Mesher*, 4 Bibb. 508.

La. *Heroman vs. La. Deaf etc. Institute*, 34 La. Ann. 805.

Me. *Walker vs. Chase*, 53 Me. 258.

Md. *Walsh vs. Chespeake etc. Canal Co.* 59 Md. 423.

Mas. *Bigelow vs. Windsor*, 1 Gray 209.

Foster Basted, 100 Mass. 409.

Jamaica Bond etc. vs. Chandler, 121 Mass. 3.

Mich. *Sayers vs. Auditor*, 124 Mich. 259.

Minn. *Wisconsin vs. Toorins*, 28 Minn. 175.

Miss. *Aznew vs. McElroy*, 48 Am. Dec. 772.

Miss. *McKinney vs. Davies*, 6 Mo. 501.

Neb. *Spear vs. Tiddbell*, 40 Neb. 107.

N. H. *King vs. Chase*, 41 Am. Dec. 675.

Neb. *Dillon vs. Chi. etc. R. Co.* 58 Neb. 472.

N. Y. *Reynolds vs. Gamer*, 66 Barb. 310.

N. C. *Burnhild vs. Freeman*, 80 N. C. 212.

Penn. *Marsh vs. Pier*, 26 Am. Dec. 131.

Cist vs. Zeigler, 16 Am. Dec. 577.

Bell vs. Allgheny Co. 63. Am. St. Rep. 795 and note.

S. C. *Marigault vs. Holmes,* Bailey, 283.

Vt. *Porter vs. Gile,* 47 Vt. 620.

Va. *Howison vs. Weedan,* 77 Va. 704.

W. Va. *Burner vs. Hoener,* 26 Am. St. 948.

Wis. *Rosenow vs. Gardner,* 99 Wis. 358.

Our statute defines a judgment to be "The final determination of the rigths of the parties in an action or proceeding."

Mont. C. C. P. Sec. 1000.

> "By such provision the state declares the legal effect and consequences of such a judgment; that it shall end the controversy as between the parties and end it forever."

State vs. Savage, 90 NW. 898; 91 NW. 557.

Where the facts averred and relied on are substantially the same, the fact that a different form or measure of relief is asked in the subsequent action, will not deprive parties of the protection of the prior findings and judgment in their favor.

Green vs. Rogers, 158 U. S. 478-502.

Nat'l. F. & P. Works vs. Octonto, C. W. S. Co. 113, Fed. 793-803.

Any right, fact or matter in issue and directly adjudicated upon, or necessarily involved in the determination of an action is absolutely *res adjudicata,* and cannot be relitigated between the parties or their privies whether the claim or demand, purpose, or subject matter of the two suits be the same or not.

Burk vs. Beverley, 1 How. 134.

New Orleans vs. Citizens Bank, 167, U. S. 371-396.

Sou. Pac. R. Co., vs. U. S., 168 U. S. 1.

Mitchell vs. Chicago First Nat'l. Bank, 180 U. S. 471.

Sou. Pac. R. Co. vs. U. S., 183, U. S. 519.

Landen vs. Merc. Bank, 186 U. S. 458.

Russel vs. Lamb, 49 Fed. 770.

Norton vs. House of Mercy, 101 Fed. 384.

Estill Co. vs. Embry, 112 Fed. 882.

Eastern Bldg. & Loan Assn. vs. Welling, 116 Fed. 100.

Aetna L. Ins. Co. vs. Hamilton Co. 117 Fed. 82.

Cal. *Green vs. Thornton,* 130 Cal. 482.

Conn. *Betts vs. Starr,* 13 Am. Dec. 94 and note.

Mass. *Baxter vs. New England Marine Co.,* 6 Mass. 277—4 Am. Dec. 125.

Burke vs. Miller, 4 Gray, 114.

Chamberlin vs Preble, 11 Allen 370.

Burlen vs. Shannon, 99 Mass. 200, 96 Am. Dec. 733.

Stockwell vs. Silloway, 113 Mass, 384.

Sly vs. Hunt, 159 Mass. 151, 38 Am. St. Rep. 403.

The same doctrine has been held by the Appellate courts in each of the following states, viz: Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, North

Carolina, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, West Virginia, Wisconsin.

Commentors upon *res adjudicata* have said it

"renders white that which is black, and straight that which is crooked *Facit ex curo rectum, ex albo nigrum,* no other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy".

Jeter vs. Hewitt, 22 How. 352.

"However numerous the questions involved in a suit, if they were tried and decided, the renewal of litigation for any of the same causes violates these cardinal principles of public policy, as much as if the suit presented but one single issue."

Whitehurst vs. Rogers, 38 Md. 503.

"The doctrine *judicium pro veritae accipitur* is dictated by wisdom and sanctified by age, and is founded on the broad principle that it is to the interest of the public that there should be an end of litigation by the same parties and their privies, over a subject once fully and fairly adjudicated."

Martin vs. Evans, 85 Md. 8, 60 Am. St. Rep. 292.

In *New Orleans vs. Citizens Bank,* 167 U. S. 371-398 the court quotes with approval the following:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness.

Cooley on Const. Lim. p. 47 *et seq.* and authorities cited."

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

Bigelow Estoppel, 3d ed. Outline, pp. Lxi, 29, 57, 103.

"The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein."

Aurora vs. West. 7 Wall. 102.

For law of proof of *res judicata* see monograph note to *Fahey vs. Esterley Machine Co.* 44 Am. St. Rep. 562.

It is true that the judgment on which we so confidently rely, is the judgment of a State Court, but such judgments are distinctly within the purview of Art. 1 Sec. 4 of the Constitution of the United States, and Sec. 905 U. S. Rev. Stats. passed to carry the constitutional provision into effect. Judgments rendered in a state court are recognized as binding in the Federal Courts, and the same force and effect are to be given them, as they would have in the court wherein they were rendered.

In *Mills vs. Duryer,* 7 Cranch. 481, Mr. Justice Story declared:

"It remains only then to inquire in every case what is the effect of the judgment in the State where it is rendered."

Mr. Justice Miller in *Green vs. Van Buskirk,* 5 Wall 309 declares this to be the leading case on this subject, and cetrainly its doctrine has never been questioned.

> *Mc Elmoyle vs. Cohen,* 13 Pet. 326.
> *Christmas vs. Russell,* 5 Wall. 302.
> *Green vs. Van Buskirk,* Ibid, 310.
> *Crapo vs. Kelley,* 16 Wall. 637.
> *Hilton vs. Guyot,* 151 U. S. 182.
> *Mutual Life Ins. Co. vs. Harris,* 97 U. S. 336.
> *Dow vs. Johnson,* 100 U. S. 186.
> *Dillingham vs. Hawk,* 60 Fed. 498.
> *Thompson vs. Whitman,* 18 Wall. 457.
> *Hampton vs. McConnell,* 3 Wheat. 235.
> *D'Arcy vs. Ketchum,* 11 How. 175.
> *R. R. Co. vs. Wiggin's Ferry Co.,* 119 U. S. 622.
> *Alkire Gro. Co. vs. Richesin,* 91 Fed. 83, et passim.

From all of this it will be understood that our contention, distinctly stated is, that what was the intention of the parties by the use of the words, "together with all the mineral therein contained," was fought out, as between these parties in the Specific Performance Case. That every issue in that case was expressly found against the St. Louis Company, and that every matter therein adjudicated is absolutely and forever determined.

THE INTENTION OF THE PARTIES.

We confess to some embarrassment in discussing the question presented by our assignments of error, numbered from IX to XIX both inclusive. Of course, our theory already stated, is, that every question as to the purpose, contents, meaning, force and effect of the bond, Defendant's Exhibit "A" attached to its answer, was tried out, set at rest and forever disposed of, as between these parties, by the Specific Performance Case. If this is so, then the testimony offered to be proven by the several witnesses named in these assignments of error, was immaterial and was properly rejected by the Court. The Judgment in that case was a specific and perpetual bar to the relitigation of anything within the issues of the case.

If on the other hand the construction, intention, purpose and object of the bond for a deed yet remains the proper subject of litigation as between these parties, then the court below committed a most grievous error in rejecting this offered proof. This was the same line of proof, and substantially the same witnesses who testified in the Specific Performance Case, and they were in Court offering to testify to the same facts in this case that they had testified to in the Specific Performance Case. We submit that the Court was retrying this case upon the theory that nothing was settled as between these parties, except that we were to have a deed for the Compromise Ground. That what was meant by the words, *"Together with all of the mineral therein contained,"* had not been ascertained by the Court, nor had

the character of the west line of the Compromise Ground, whether it was the intention of the parties that this should be a vertical line, absolutely cutting off the right of either party beyond it, or whether it should be regarded as if it were simply the westerly claim line of the Nine Hour. In short, he was trying this case as if every question that was or could be raised, save and except our right to the deed, was absolutely at large. Under this view, the refusal to allow us to make this proof was absolutely the rankest kind of error, Nor was there any excuse for it, on the pretence that he was bound by "the law of the case." We did not offer these proofs on the former trial. We supposed that the judgment we were relying on, had the same potency and effect that other judgments have, and therefore we did not attempt to reinforce it by showing the circumstances surrounding the parties at the time they executed and accepted the bond for a deed, or by showing what was their definite verbal understanding which they supposed they had clearly expressed in the bond.

On refusing to permit the defendant to make this proof, the Court violated several of the best established principles in English jurisprudence.

These fundamental and established principles have been embodied in our Civil Code, and are as follows:

> "Sec. 2201. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

"Sec. 2203. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"Sec. 2212. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

McNeil vs. Shirley, 33 Cal. 202.

Creighton vs. Vanderlip, 1 Mont. 400.

Thompson vs. McKay, 41 Cal. 221.

Reiley vs. Smith, 42 Cal. 245.

In the opinion which the Court held to be the only law he would look to in the trial of the case, these principles are clearly recognized. This Court says:

"In interpreting the conveyance in question, regard must be had not only to the terms, but the subject matter involved and the surrounding circumstances in order to ascertain the intention of the parties."

And again:

"All these antecedent circumstances leading up to and culminating in the deed, are properly considered in determining what was the intent of the parties to the contract."

102 Fed. Rep. 430-432-433.

And in harmony with this expressed view, your Honors in the 102 Federal proceed to consider such circumstances as the record then before you disclosed. As however, the plaintiff in error, relying on its contention that the language was not ambiguous and therefore not

the subject of interpretation, but conclusively determined the right to all mineral to be in the grantee had introduced no evidence other than the deed itself, and as the defendant in error had introduced only the judgment roll in the specific performance case,—though that was introduced for an entirely different purpose—and as the specific performance record made it appear as if the predecessors of plaintiff in error, by the bond in question, had gotten all the surface that they laid claim to in their adverse claim suit, your Honors were thereby influenced to conclude that it was not intended to pass minerals in veins apexing elsewhere, and this as you expressly say because had they tried and won the adverse suit they could not have won the apex of the vein in the St. Louis Ground. The record then before you was contrary to the actual facts; and this offered proof, among other things, would have shown that the plaintiffs in the adverse suit would have gained the entire apex of this Drum Lummon vein had they won the suit. Your Honors, in your opinion, say that the giving of the bond was a *confession* that the claim of the plaintiffs in the adverse suit was just. Had you then known from that record that that claim, if established, would have given them the whole apex, and that this was the only vein giving value to the ground, and that there never was any mineral in the ground, save mineral in ledge form and in this single vein, how differently you must have then viewed the language to be interpreted, and how readily, had you then been hearing evidence to interpret the conveyance, would you have

heard this proof as aiding you in interpreting this language in the bond. Yet the court, retrying this cause, refused to hear it, not because he did not consider it material and proper, if he had not been forclosed by your opinion, but for the sole reason that as he read your Honors' opinion you had declared that the language was unambiguous and that by force of the words themselves we were conclusively forbidden from claiming,or attempting to prove, that they were meant to pass mineral in a vein apexing without the bonded surface. It is hard to see how the trial court could have reached such a conclusion from reading your Honors' opinion, especially when an examination of the briefs of counsel on file in the case, and on which the case was heard, and argued, and submitted, conclusively showed that there never was any contention advanced to your Honors that the language was conclusive in favor of the St. Louis Company.—our contention being that it was conclusive in our favor, and the contention of the St. Louis people being that it was not so conclusive, but was uncertain enough to justify the receipt of extraneous evidence to interpret it, and that there was enough of such extraneous evidence in the record before the Court to compel the conclusion that the language should be interpreted favorably to their claim.

The refusal of the court to allow us to make this proof, was certainly not in harmony with either the spirit or the letter of the decision he professed to be following so closely. There is nothing in the opinion of your Honors' in the 102 Federal that could justify any one in

concluding that the views you expressed were not in perfect harmony with all the decided cases on the matter of interpretation of ambiguous language in an instrument, and certainly nothing that would excuse the conclusion that you had sought to put yourself in that opinion in opposition to all the decided cases, as you would be, if the interpretation put upon your opinion by the trial court was correct. We content ourselves in conclusion with citing the latest announcement of the principles of interpretation which must control in construing the language of this instrument, as declared in a case involving a conveyance of coal mining lands, in an opinion rendered April 27th of this year, by the Court of Appeals of Kentucky. One of the deeds there to be construed contained the following language, which, however, was in the habendum and not in the descriptive or granting clause:

> "together with the coal banks reserved by said George to himself in the deed made to J. B. George."

The other contained in the habendum clause a reservation as follows:

> "with the exception of all the coal banks."

The Court said:

> "The rule is that a deed is construed as any other instrument to effectuate the intention of the maker, and reservations or exceptions are enforced, although contained in the habendum clause of the deed, as fully as if set out in the granting clause, when on the whole instrument the intention of the parties is suf-

ficiently expressed to be enforced. Although the reservation in the deed from Robert George to James D. George is inserted in the habendum clause, it is so fully and clearly expressed as to leave no doubt of the intention of the parties that the grantor reserved all the coal banks on the lands, and held the right to them and the privilege of a way to the different coal banks with a wagon and team. It is insisted for appellees that the words ''coal banks'' must refer to a mine that has been opened, but it is agreed in the record, as a fact which we know to/be true, that when the deeds were made the county was sparcely settled, there were no railroads, and no mercantile development of coal mines. In view of the entire language of the deed, and the circumstances under which it was made, when the grantor reserved all the coal banks, he referred to the veins of coal in the ground and not merely to such as had been opened. There had been little or no development of coal lands at that time, and the purpose of the grantor was to reserve the coal under the land.

It is earnestly insisted that in the deed from Robert George to Bruce there is a conveyance of only the four tracts of land, and that all that is said about the coal in that deed occurs in the habendum clause. The rule is relied on that the habendum clause will never extend the granting clause so as to make the deed cover property not included in the granting clause. But the rule referred to is not recognized by the more modern authorities, and is not enforced in this state. The modern rule is to read a deed as any other instrument.''

Jones et. al. vs. American Assn., 86 S. W. 1111.

It will, thus be seen that for the purpose of interpreting the phrase ''coal banks'' to determine whether it means developed mines or hidden minerals, the court con-

sidered the situation of the property, the general development of coal mines and settlement of the county, the presence and lack of railroads, and concluded from all these extraneous circumstances that the purpose of the grantor was to reserve all coal under the land. We offered similar proof as to the situation of this property and the development on it and surrounding properties, the knowledge of the existence of the apex of the Drum Lummon vein and that it lay within the adverse area, was known to dip into the ground described in the bond, and that it was the only mineral in that ground, and that otherwise the ground was worthless, all of which proof, most material and necessary, to the interpretation of the deed, the Court rejected. It is difficult to see how the parties, in the light of the fact conditions as they were known to exist at the time of the drafting of the bond, could have directed the scrivener to use language better calculated to express the idea they wished to convey than this language which our offered proof tended to show was chosen by the scrivener upon the direction of the parties, to express the very purpose that they then had in mind, viz: to pass all the minerals in the Compromise strip without regard to whereabouts of apex. See also.

Bogart et. al. vs. Amanda etc. Mng. Co. 74 Pac. 883, (hereafter quoted from under head of Estoppel by deed.)

Brady vs. Brady, 84 N. Y. Sup. 1119.

Even if the decision in the 102 and the 104 Federals had been "the law of the case", in the strictest sense of the term, it is well settled that new facts may be proved, which will relieve the case from the doctrine. That it was the express agreement of the obligor and the obligees named in the bond that in consideration of the large area of the Nine Hour Claim, which they were surrendering, that they were to have the Compromise Ground relieved of any apex rights of the St. Louis claim, was certainly a new fact, and a very improtant one.

> "It is well settled that such decision though unreversed and still binding as between the parties, is not the 'law of the case'. when on the second trial a new state of facts is established from what was established on the first trial. Where new facts are brought into the case it relieves the court below and it is not so conclusively bound by the decision of the Appellate Court, but it should apply the law applicable to the new and changed state of facts."

Dodge vs. Gaylord, 53 Ind. 365.

Bloomfield vs. Buchanan, 12 Pac. 238.

Mitchell vs. Davis, 23 Cal. 382. *et passin.*

In the case of E. A. Packer, 58 Fed. 249-254, a single new fact was sufficient to relieve the case of this doctrine.

Says Lacombe, C. J. in this case:

> "All the testimony in this case came before the Circuit Court on the second hearing and by the appeals brought before this court, and the existence of the very rule of the supervising inspectors which the Supreme Court refused to consider because it was

> not proved, is now a fact in evidence. Under these circumstances, it was clearly the duty of the Circuit Court to pass upon the whole case, and in disposing of this appeal we are not constrained by the expressed opinion of the Supreme Court upon the incomplete case which that tribunal had before it."

The reversal of a judgment destroys its efficacy as an estoppel.

> 2 *Black,* sec. 511 p. 611.
>
> 1 *Wharton on Evidence,* 781.

These authorities might be supplemented by very many more. Indeed an examination of the numerous cases, bearing upon this proposition, will convince the Court, that the refusal to permit competent testimony of this character to be given, is of very rare occurence.

ESTOPPEL BY DEED.

We have pleaded an estoppel in our answer in this case, based upon the bond, the judgment and the deed. So far as the deed itself is concerned, it is always to be borne in mind that it was not a voluntary one. It was only made by the defendant in error, because under the decree of the Court, and the Statutes of Montana, it had to be made before an appeal could be taken to the Supreme Court of the State. The defendant in error had filed an answer in the Specific Performance Case, in which it denied that we were the successors of William Robinson and other locators of the Nine Hour; that we were the owners of the Compromise Ground, or were in possession of the same,

or entitled to the possession of the same, or *the mineral therein* then or at any other time, and they avered that the said Compromise Ground was then and always had been a part of the St. Louis Claim, originally located as such, and that it was not and never had been any part of the Nine Hour Claim. It admitted the adverse proceedings and suit, and the execution of the bond by way of a compromise, but it avered that such adverse claim was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to his St. Louis Mining Claim, and that said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience. These vital issues were fought through to the court of last resort as already stated, for the purpose of preventing the delivery of the deed, which in the meantime was held, under the statute, by the Clerk of the Court. Nothing can be predicated therefore upon the deed. So far as the grantor was concerned, it was his intention that it should not be delivered to us, if its delivery could be prevented. On the other hand, it was the intention of the grantee to compel a delivery which it ultimately and after a long struggle accomplished.

But is not the bond which is in substance, a deed, a complete estoppel in this case, even on the Court's theory, that the words, "together with all of the mineral therein contained", are absolutely meaningless? Of course in the construction of this bond, these words must be found to have a meaning, and their meaning must be held to be

exactly what the parties intended and agreed that they should mean. One of the first canons of construction is that effect must be given to every part of the contract, if possible, that is unless the stipulation is found contrary to law or morals.

Evans vs. Sanders, 8 Porter, 497.
Richardson vs. Palmer, 38 N. H. 212.

But let us leave this feature entirely out. Suppose the bond had said nothing about the mineral, but had stipulated to convey the Compromise Ground to us by metes and bounds. What then would have been the respective rights of the parties? It cannot be doubted that we would have had all that the Court wants to give us under the bond, we took, viz: all mineral found in veins having their tops or apices within the surface boundaries of the ground thus conveyed. But how would it have been with the St. Louis Company? Would it have been entitled in the absence of any reservation of extra-lateral rights in its deed, to have followed into the ground thus conveyed such portion of the vein as had its apex within the surface boundaries of the St. Louis Claim? It is to be remembered that this is a conveyance by metes and bounds. a conveyance of everything within those surface boundaries, unless it be a vein having its apex within that portion of the St. Louis reserved by it, and why not of this as well, unless reserved by fitting and appropriating language in the conveyance?

The doctrine of extra-lateral rights is clearly in con-

travention of the common law. There is nothing in the statute giving the right of lateral pursuit any of the qualities of a covenant running with the land, or making it inalienable except in express terms. It would seem to follow that unless this right was preserved in the deed by fit and appropriate words of exception from the grant, everything contained in the land would pass by the deed and the grantor would be estopped from thereafter asserting this right as against his grantee. The Government of the United States occupies no different plane, when it comes to dealing with its real estate, than does any other owner of that species of property. When it comes to make a conveyance, *i. e.,* a patent of a mining claim, it does two things with reference to extra-lateral rights. First, it conveys to its grantee the right to pursue the vein found within the surface boundaries of the claim in its downward course, though it passes under the vertical side lines of his claim and into the premises adjoining; and secondly, in express language it excepts from the grant made, and reserves to an adjoining owner the right of extra-lateral pursuit. If the reservation is necessary in a patent in order to give an adjoining owner this right, or if unnecessary in a patent, it is only so because the reservation has already been made by statute, then it is equally necessary in a deed from an individual and a grantor not reserving it would be thereafter estopped by his deed from asserting it against his grantor.

It seems to us the case of *Stinchfield vs. Gillis,* 107 Cal. 86; 40 Pac. 98, is in point upon this proposition.

"The effect of the deed from Gillis to plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface line of his deed. The gold in controversey was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the *deed contains no reservations,* and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms by holding that the entire West vein within the surface lines, even though intersected by another, passed to the plaintiff."

The facts in this case are found in the opinion of the Court on a former appeal, 96 Cal. 400; 30 Pac. 839. On and prior to January 17, 1886, Gillis was the owner of the "Carington" claim. On that day he sold to Stinchfield a portion of his claim known as the Pine Tree Mine, conveying the same to him by a simple bargain and sale deed. At this time one Rice was working on a portion of the Carrington claim not included in the sale to Stinchfield, which was known as the Rice vein. The apices of the two veins, called respectively the "West" vein and the "Pine Tree" vein, were within the surface boundaries of the "Pine Tree" claim, while the apex of the Rice vein was on that portion of the claim not sold to Stinchfield. Immediately after the sale to Stinchfield, Gillis made a new location on the part not

sold, and a few days afterwards Stinchfield also made a new location on the part of the claim he had purchased from Gillis. In other words, both parties abandoned the "Carrington" location, and each for himself made a new location of his part of the claim, Gillis being the elder. Rice, who was working for Gillis, followed his vein down to where it intersected the "West" vein, under the surface conveyed to Stinchfield and removed ore at that point of the intersection of the two veins, of the value of about $10,000. Stinchfield brought suit against Rice and Gillis to recover for this trespass, and notwithstanding his was the junior location, recovered judgment. Under the provisions of Sections 2336, U. S. Rev. Stats., providing that all ore in the space of the intersection of two veins, shall belong to the prior locator, Gillis would have been entitled to the ore but for the estoppel created by his deed. If one right of this character conferred by the statute, may be thus lost, another right of the same character may be lost in the same way.

We wish now to invite the attention of the court to the case of *Bogart et al vs. Amanda etc., Mining Company,* decided by the Supreme Court of Colorado, December 7th, 1903, and reported in the 74 Pac. Rep. 882 et. seq. The action was to enforce specific performance of a contract to convey mining ground. The contract was made to settle an adverse claim between the Amanda and the Bogart lode claims and by it the owners of the Bogart agreed after the issuance of patent to convey "the surface ground included within the conflict, saving and ex-

cepting from said deed so to be made, the Bogart vein, lode, ledge or deposit, wherever the same may be found to cross or pass through the conflict surface." The decree directing specific performance of that contract expressly required the defendants to convey all the territory in the conflict "including all the minerals below the surface saving and excepting the Bogart vein". It will be noted that the bond contract there involved was limited to surface ground, but excepted a single vein, yet, upon that bond contract the court below decreed a conveyance which should expressly include all the minerals beneath the surface, save only the excepted vein. It was contended that the bond only obligated the Bogart owners to convey surface grounds without minerals; that the expression "surface ground" had a distinctive meaning in mining regions and could not be interpreted to include any minerals below the surface. Speaking of this the Court said:

> "Unquestionably, in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface. As expressed in 1 *Lindley on Mines,* at section 2, under the common law minerals were the property of the owner of the land, the property on the surface carrying with it the ownership of everything beneath and above it; and this prima facie ownership continued until rebutted by showing that ownership of the mines and minerals had be-

come in fact several and distinct from the ownership of the soil or surface. See also *Barringer & Adams on the Law of Mines,* p. 4. In 2 *Washburn on Real Property* (6th Ed.) Par. 1318, the learned author says: 'Whoever owns the surface is presumed to own and would originally actually own whatever minerals there might be beneath the surface, until he shall have granted away the one or the other, and thus separated their ownership.'

What was the intention of the parties at the time they made this agreement? If there is any ambiguity in the language employed, it must be resolved in favor of the grantee and against the grantors. The object of the court should be to place itself, as nearly as possible, in the position of the parties at the time, and from the terms of the contract and the surrounding circumstances arrive at their meaning. We do not think there is any difficulty in ascertaining this intention from the language of the written agreement. While there may be two distinct ownerships in mineral land,—one of the surface or the soil, and the other of the minerals underneath,—we are satisfied that by this agreement the applicant for the patent for the Bogart claim intended to convey to the owners of the conflicting location not merely the surface ground in conflict, as contradistinguished from the mineral beneath, but with this surface ground all underlying minerals except the Bogart vein.''

Here not only was the reservation held to be necessary to carve out the Bogart vein, but the reservation was held to be operative to interpret the words ''surface ground'' in the bond as comprehending all minerals save the reserved vein.

The effect of the conveyance of a part of a mining

claim on the extra-lateral rights of veins found in the part not conveyed, is shown after a fashion in article VI, 2 *Lindley on Mines,* Sec. 616 et seq. He cites this case from 102 Federal and though he expresses no opinion, he seems to approve the doctrine that extra-lateral rights may be maintained for veins apexing in the unconveyed portion of the claim, and that in order to make conveyances of the extra-lateral right, there must be a specific designation of it. The other cases cited by him except Stinchfield against Gillis and Central Eureka M. Co. vs. Toman do not touch the question. Stinchfield vs. Gillis *et supra* as already explained is only in point so far as it establishes the fact that one right given by the Mineral Land Act may be lost by a conveyance of a part of a claim unless it is properly reserved or excepted out of the portion of the deed of conveyance.

The case of *Central Eureka M. Co. vs. Toman* referred to by the author will be found cited under the title of *Central Eureka M. Co. vs. East Central Eureka M. Co.,* 79 Pac. 834, and this supports our contention.

The plaintiff was the owner of the Summit quartz mine which had been located and patented under the law of July 26th, 1866, 14 Stats. 252, the patent purported to convey the lode, for a given distance on its strike througout its entire depth although it might enter the land adjoining. Subsequently the defendant, Toman took up a ranch adjoining the Summit lode, and into and under which the vein, on its dip, extended. Some controversy

arose between the plaintiff and the Tomans, and to settle this the plaintiff gave the Tomans a quit claim deed, not for any part of the Summit mining claim, but for the premises "lying east of that certain patented mining ground known as the Summit Quartz Mine". The deed also purported to be a release of the Tomans from all claims, bonds or contracts made by the Tomans to it or its predecessors, and particularly from any covenant in an agreement between the parties dated October 23rd, 1897. Though it is not so stated in the opinion, it is most likely that the Tomans had given the plaintiff some contract or agreement to convey some part of the Toman ranch to it, which had been placed upon record, and that the intention of the parties was to release this agreement by means of the quit claim deed which would be recorded, and the record made straight. Under this deed, the defendant was claiming the ore found under the surface of the Toman ranch. The court thus states the contention:

> "Defendants, relying upon the well recognized principle that a conveyance of land, IN THE ABSENCE OF EXPRESS RESERVATION, carries not only the surface of the earth, but everything under it, and over it, *including the minerals therein contained,* claim that the effect of this deed was to convey to the defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quit claim deed *if the description in the deed includes the same.*"

The capitals and the italics are ours. The court cor-

rectly holds, we think, that the description did not contain any part of the Summit Quartz Mine. That the vein under the Tomans surface was as much a part of the mine as anything within the surface boundaries of that claim and hence was not conveyed.

A very pertinent part of this opinion, so far as the proposition we are now considering is concerned, is the following:

> "A very different case would be presented, if we were dealing with a deed which contained a conveyance of a parcel of land simply by *metes and bounds,* or a deed which purported to *convey all lands* lying east of a certain defined surface line. We have no such deed here, but one which in terms limits its operation to such portions of the designated sections, as lie east of the mining ground of plaintiff, Taking into consideration simply the character of plaintiff's property, we are of the opinion that the deed does not purport to convey any portion of any vein that had its apex within the surface lines of plaintiff's location so far as it lay between the converging end lines of plaintiff's claim."

The quotation made by the author from the opinion in the case of M. O. P. Co. vs. B. & M. Co., 27 Mont. 288 would seem to be in point but an examination of the case will disclose the fact that the reverse of the proposition we have to deal with, was there under consideration. The question in that case was not, were extra-lateral rights excepted from, but were they included in, the grant. The court very justly, as we think, finds they were included in the grant. A rehearing was granted in the case, and the

opinion of the court is found in the same volume, page 356. Both opinions should be read in this connection, and from both it will be seen that the question we have to deal with is not determined.

IN MONTANA.

It may be confidentially asserted that in the State of Montana, a conveyance of a portion of a mining claim by metes and bounds, or generally by definite surface lines, without any reservation to the grantor of extra-lateral rights for the portion of the claim not conveyed, is a conveyance of extra-lateral and every other right which he had in the portion of the claim so conveyed. The court will clearly understand our position. We say that the bond for a deed given our predecessors in interest, if it had not contained the words, "*together with all of the mineral therein contained,*" would have conveyed to us, all the mineral in the ground, and that extra-lateral rights of the St Louis claim would have been cut off at the westerly side line of the Compromise Ground precisely as they are now. In this sense the court is right in saying that these words neither add to or take away anything from the deed. In this case, it was the express agreement between the obligor and the obligees named in the bond, that the west line of the Compromise Ground should be an absolutely vertical line, and that the obligor should relinquish any and all claim he might have to everything lying to the eastward thereof. As expressing the intention of the parties, at the time and as showing that there was to

be no reservation in the deed of extra-lateral rights for veins found within the St. Louis claim, these words were used,but they were not indispensibly necessary to convey extra-lateral rights.

Entering into the bond and a part of it, and of the deed, which the obligor agreed thereafter voluntarily to make and deliver, was the statute of the State (then Territory) of Montana, a part of which was the following:

> "That the common law of England, so far as the same is applicable, and of a general nature, and not in conflict with special enactments of this territory, shall be the *LAW* and the *RULE OF DECISION,* and shall be considered of full force until repealed by legislative authority.". Act of June 2, 1872.

Trry. vs. GeWan, 2 Mont. 429.

Trry. vs. Va. Road Co., Ibid 194.

Butte Hardware Co. vs. Sullivan, 7 Mont. 312.

Palmer vs. McMasters, 8 Mont. 192.

Milburn Mfg. Co. vs. Johnson, 9 Mont. 541.

Forrester vs. B. & M. Co., 21 Mont. 544, 557.

Other statutory provisions bearing upon this questtion are as follows:

> "A transfer vests in the transferee ALL the actual title to the thing transferred which the transferer then has, unless a different intention is expressed or necessarily implied."

Mont. Civil Code. Sec. 1490.

"The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer

of an incident to a thing does not transfer the thing itself."

Ibid Sec. 1491.

"A grant is to be interpreted in favor of the grantee."

Ibid Sec. 1473.

"A transfer of real property passes all easements attached thereto."

Ibid Sec. 1510.

"A fee simple title is presumed to be intended to pass by a grant of real property."

Ibid Sec. 1511.

"Every grant of an estate in real property is conclusive against the grantor."

Ibid Sec. 1513.

What is there in the statutes of Montana, or in the statutes of the United States, to prevent a deed for a part of a mining claim taking effect as a common law deed, and conveying to the grantor therein named, everything within the defined surface boundaries extended downward vertically? Where and when and how has the common law, thus solemnly adopted and declared,been altered or changed in the State of Montana? True, extra-lateral rights are conferred upon the miner by an act of Congress, but after he has secured them by virtue of his compliance with the provisions of the Act, they belong to him, and he can convey them in any way he sees fit. When he has conveyed, and how he shall convey them, are questions that can only be determined by the laws of the State in which the mining claim is situated.

EUREKA CASE.

In the celebrated Richmond Eureka case 13 Otto, 839, Mr. Chief Justice Waite, who had never seen a gold or silver mine until he visited Montana, who had never had any practical experience in the trial of mining cases, says: "In establishing this line it is to be presumed that the parties had in view the peculiar character of the property about which they had been contending."

And again

> "The language used is to be construed with reference to the peculiar property about which the parties were contending."

This language has been held in some courts, particularly at *nisi prius,* to justify the conclusion that the extra-lateral right would not pass, except the deed con tained the clearest sort of language showing that it was the intention of the parties that it should pass. In the case at bar, in the opinion found in 102 Federal, your Honors say:

> "To manifest such an intention the terms of the contract and the conveyance would under the circumstances, need to be clear and explicit. The use of the words, "together with all the mineral therein contained," is not sufficient."

Very evidently your Honors in this refers to the "peculiar property," already mentioned in the preceeding part of your opinion. But is there anything in this, or elsewhere in the Richmond Eureka case, that will justify the conclusion that an extra-lateral right will not

pass, unless the language of the deed is clear and explicit? That no difference what may be the law governing conveyances in the jurisdiction in which the mining claim is situated, a conveyance that does not in clear and explicit terms show that it was the intention of the grantor to part with all of the mineral contained in the ground conveyed, without regard to where the apex of the vein in which such mineral was found might be, is insufficient to convey the grantors extra-lateral rights, to veins having their apices in the portion of the claim retained by him? The case in the Circuit Court is found reported in 4 Sawy. 302. It was tried before Mr. Chief Justice Field, and Judges Sawyer and Hillyer, whom Mr. Lindley says were "three of the most eminent mining judges of the west." 2 Lindley on Mines Sec. 576. The opinion is by Field, and is universally recognized by both the bench and the bar of the Pacific Coast as being one of the clearest and strongest opinions ever written by that great jurist. Every proposition decided in it was novel, absolutely questions of first impression. It has stood the test of time. Not a single principle announced in it, has been over-ruled, denied or even doubted by any court in the land, in the 28 years that have elapsed since its rendition.

There is one significant fact in connection with this opinion to which we especially wish to direct the court's attention and that is, that in this learned and able opinion of Mr. Justice Field, the "peculiar property" or the "peculiar character of the property" idea, finds no place or lodgement.

So far from either opinion being any authority upon the question of how, or when, or by what words or phrases extra-lateral rights will be conveyed, both the opinion in the Circuit Court, and that of the Supreme Court are silent, and ignore the doctrine of extra-lateral rights. At page 820, 8 Fed. Cas. where the case is reported, a better map of the claims in controversy is found than that shown by Mr. Lindley. Referring to this, it will be seen that the line established by the agreement of the parties, starts at the northwest corner of the Nugget anl thence runs diagonally across the westerly end of the Champion to where it intersects the common end line between the Champion and Richmond, thence it extends northerly on the common end line between the "At Last" and the "Lookout", and along the west end line of the "Margaret" to the point at X and thence it was continued in the same direction by the opinions of the courts, to the point C. Looking now at the diagram it will be seen that there are croppings on the west end line of the "Richmond" the line common with the last named claim and the "Tip Top", and croppings are shown again about the center of the "*Champion,*" so that the apex of a vein must have passed through the diagonal southwest corner of the "Champion," cut off by the line from point W. to the northwest corner of the "Nuggett." This triangular southwest corner of the "Champion" under the terms of the agreement, was the property of the Richmond Mining Company, and following the vein on its dip, between the points where the apex passed through the hypothen-

use and perpendicular of the triangle, it would have led down into the Potts Chamber and given the ore in dispute, or the greater part of it, to the Richmond Company. No notice whatever, of this significant fact is taken by either the Circuit or the Supreme Court, and the controlling thought of both opinions is the established line.

But again, out-crop is shown in the diagram on both the "At Last," and the "Margaret" belonging to the Eureka Company. Suppose the apex of the veins in each of these claims followed on their dip would have led down into the Potts Chamber, why would it not have been all sufficient for the court to have said, "The plaintiff has the apex of the vein in its "At Last" or its "Margaret" claim, or in both, and this apex on its dip leads to the Potts Chamber, therefore the ore in that chamber is its ore. On the contrary the doctrine of extra-lateral rights for any of these claims is ignored in the opinions of both courts, and in both the validity and construction of the agreement of the parties is the determining factor.

PRIORITY.

And here we may fittingly pause for a brief moment, to consider the doctrine of priority of location. Suppose that from each of these claims, the Champion triangle belonging to the defendant, and the "At Last" and "Margaret", belonging to the plaintiff, veins sufficiently continuous on their dip to be followed by a miner, led down into the "Potts Chamber" and that the rights of the parties was to be determined by

the law of the apex. Then clearly the old maxim, "*qui prior est tempore potior est jure*" ought to prevail, and the first party, to make a valid location in point of time should be awarded the ore from the "Potts Chamber." Perhaps this might be true under the conditions as they actually existed in the ground. These conditions are very graphically set forth by Mr. Justice Field in the beginning of his opinion. There was there, in point of fact, a great mineral bearing zone of metamorphosed limestone. The foot-wall was quartzite some hundred of feet in thickness. The hanging or northerly wall, was a belt of clay, or shale, ranging from an inch to seventy or eighty feet in thickness. At the east end in the Jackson mine, the quartzite and shale approached each other separated by scarcely more than an inch of talc. From this point going westerly the walls diverged until on the Eureka they were five hundred, and on the Richmond about eight hundred feet apart. Between these two walls was brecciated limestone irregularly mineralized. In places, in little vugs and caverns in the lime there were valuable mineral deposits. In places these mineralized portions were very rich and quite extensive; in other places less so, and in other places it was so slightly mineralized as that its mineralization was so little as to be scarcely perceptible. There was no continuation of the fissures either on strike or dip which a miner might follow,either with the certainty or reasonable hope that it would lead him to other bonanzas. In short precisely the same condition prevailed in this case which is usual-

ly encountered in almost every other case, where either gold or silver is found in lime dikes. This and nothing more was what Mr. Chief Justice Waite meant when he spoke of the *"peculiar character of the property."* It was a broad apex, one great mineral zone, too wide for a single location, and upon which several locations might be made. What would be the relative rights of senior and junior locators on such a zone has not been ultimately determined.

In the case at bar, priority of location cuts no figure. By agreement it was patented as a part of the St. Louis location, and it cannot be claimed that one part of a mining claim can have priority over another part of the same claim. So far as the two blocks 5 and 10 are concerned they were of no value, the ore found in them being too low in value to pay for milling. These two blocks are the only ones lying east of the east side line of the Compromise Ground.

But suppose the Nine Hour was the senior location. What difference would that make with the right of the St. Louis Company to pursue on its dip, any vein having its apex within the St. Louis surface? Not a particle—since all such veins are expressly excepted out of the Nine Hour patent and are included in the St. Louis patent. True if the doctrine announced in the opinion found in the 102 Fed. is to prevail the conditions therein found would be exactly reversed. We would have a portion of the apex from B. to A. (Fig. 2) within our surface, and would be entitled to the same surface and same rights in the St.

Louis claim, which that decision awards to the St. Louis in our Compromise Ground. It is respectfully suggested that this is not the law.

PECULIARITIES IN THIS CASE.

There are peculiarities about every mining property, and peculiarities about every mining case. The case at bar is no exception to this rule. For example it is clear from the record in this case that the greater part of the present St. Louis claim was originally the "Ivanhoe" owned jointly by Mr. William Mayger, whose other name is the St. Louis Mining & Milling Company of Montana and Mr. Nathaniel Collins, the discovery vein of which was the *vein* found in the south drift of the Transcontinental tunnel. (Record p. 52-53).

That Mr. William Mayger through his brother Charles caused the "Ivanhoe" location to be jumped and the St. Louis claim to be located. (Record p. 52).

That pursuant to the written direction given to him by his brother William by letter from Butte, Montana. Mr Charles Mayger did locate the St. Louis claim. (Record p. 51).

That the discovery vein upon which Mr. Charles Mayger made the location was the vein found in the sixty-five foot shaft. (Record p. 52).

That the location thus made by Mr. Charles Mayger was a perfectly regular parallelogram of the regulation size fifteen hundred feet in length by six hundred feet in width (Record p. 119 et seq.), that its so-called side lines

were perfectly straight lines, and that it was not the hexagonal figure shown in the diagram contained in its patent. (Record p. 279).

That as originally located and staked, it did not include a single foot of the Drum Lummon vein within its surface boundaries.

That when the Nine Hour was subsequently located, its westerly line did not reach the easterly line of the St. Louis by about fifty feet at one end and twenty-five feet at the other end. (Record p. 121).

That when the St. Louis was surveyed for patent the east line of that claim was wrongfully extended to the eastward and over the Nine Hour surface from corner No. 1 of the St. Louis to what is now corner No. 2 of that claim, and from the corner last named to corner No. 3 of that claim, and embraced an area of the Nine Hour claim of 1.98 acres, a part of which is the Compromise Ground. (Record p. 119).

That the portion of the Nine Hour so wrongfully jumped by the Maygers and included in their St. Louis location, included about six hundred lineal feet of the apex of the Drum Lummon lode, and included the portion thereof for which the plaintiff is now claiming extra-lateral rights in the Compromise Ground, and the Nine Hour. (Record p. 121).

That in the settlement of the adverse proceedings and suit, brought by the owners of the Nine Hour in consequence of this wrongful overlap the Maygers agreed in the bond for a deed to convey a strip of ground, the west

line of which was to be parallel to the surveyed line of the St. Louis between corners Nos. 2 and 3 and fifty feet distant from the center of the Discovery shaft at right angles to said survey line. That the west line of the Compromise Ground is only about forty feet so measured from the center of said Discovery Shaft. (Record p. 123).

There are other peculiarities set out in the proof offered to be given by Robinson, Decamp, Sterling, Eddy and others relating to the verbal understanding of the parties, which should be weighed and considered, in determining whether the extra-lateral rights of veins in the St. Louis were intended to be conveyed by the words found in the bond relation to the mineral contents of the Compromise Ground, and whether the parties thereto understood them to be so conveyed.

In a way we have digressed a little from the proposition we set out to maintain, viz. that in the State of Montana, a conveyance of a specific portion of a mining claim, the grantor not reserving in his deed by fit and appropriate words, extra-lateral rights for veins having their apices in the part of the claim not conveyed, loses the same, and that no reservation of this right can be implied by reason of a mining claim being "peculiar property." That, in short, a reservation in the deed is necessary to retain them, and that absolutely no discription of them in the deed is necessary to convey them. This seems to be true in Colorado as well as in Montana.

The case of *Bogart vs. Amanda Consol. Gold Mining*

Co., 64 Pac. 882, is directly in point on this question. We quote as follows:

> "Unquestionably, in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface."

We really feel as if we should beg pardon of the court for having discussed this simple question at such length. We have spoken of Montana, California and Colorado as states wherein the rule obtained as if they were or might be exceptions. They are not. Wherever the common law is the law, and the rule of decision, it must follow that all the mineral contained in the ground conveyed will pass to the grantee. If the grantor wishes to retain such rights for veins having their apices in that portion of the claim reserved by him, he must except them in his deed precisely as the United States does in its patents.

ASSIGNMENT XX,—THE AMENDMENT.

This suit was originally begun September 16th, 1893, for ore extracted prior thereto, averred to have been of the value of $200,000.00. Thus the pleading remained until November 21st, 1898, when by a so-called amendment, it was alleged that between September 16th, 1893 and the latter date additional ore of the value of $50,000.00 had been extracted; and during the former

trial, in August '99, this amendment was itself amended by merely changing the last date to June, 1899. Thus, under the pleadings as they stood until the amendment now complained of during the present trial, plaintiff could have recovered but $50,000 for ore extracted after September 16th, 1893, if, in this action, he could be permitted to recover anything for ore dug after the suit begun.

Plaintiff's evidence showed indisputably that every block of ore except blocks 8 and 10 lay between the 108 and the 133 foot planes, and that all the ore extracted between these planes was dug either in the years 1898 or 1899; the defendant's evidence confirmed this. Block 8, by the uncontradicted evidence was extracted in the year 1898, and but $18,626 of value was claimed by plaintiff for block 10. Thus, plaintiff's recovery must have been limited to $18,626 for ore extracted before September 16th, 1893, and $50,000 after, or $68,626 all told.

As plaintiff in its case in chief offered its proofs of ore extraction and value—block by block as offered, objections were interposed and exceptions taken by defendant, each presenting the question of the limit of recovery under the pleadings, as well as the further point that plaintiff's proofs left it uncertain as to many of the blocks how much was extracted before and how much after June 1899, and as to 10, how much was extracted before and how much after September 16th, 1893. This left no room for the contention on motion to amend that it was proper to make the pleadings conform to proofs

received without objection. (See Assignment of Error, VIII.)

Near the close of this six weeks trial, without any support by affidavit, showing, or otherwise,—though the pleadings verified by the personal oath of the Manager and chief fact witness of plaintiff Company had stood in this condition for over six years since the last extraction of ore had occurred, and nearly two years since the remittitur had been filed, and though the evidence disclosed that under court orders they had in the year 1899 measured up and assayed all areas of extraction between the planes, and that all their proofs on trial were predicated on the knowledge then gained, and they had gained no new knowledge since, and though their attention had been called to the condition of their pleadings during the entire production of their proofs,—the court, nevertheless, allowed them against our objection to amend the amount of $50,000 to $400,000, and to thereby carry the date forward from June '99 to the time of the amendment itself, thus obviating their failure to show how much was before and how much after June 1899.

The objection was again in part preserved by the last ground assigned in our motion for verdict. (See Assignment XXI): and by our offered instructions numbered XXXVII, XXXVIII, XXXIX, XLI and XLII —each refused by the court and each refusal made the subject of assigned error.

We insist:

(1st) That the amendment was not allowable be-

cause it was a new cause of action, since no recovery could be had in this suit for a single pound of ore dug after its commencement.

(2nd) That there was no waiver on our part merely because they were allowed by the court to make the amendments of November 1898 and August 1899.

If, however, it could be claimed that this was a waiver, it only extended to the value then alleged, and could not operate on the future; and that the doctrine that you may amend the ad damnum, would only apply to what might without waiver be recovered for in the action, i. e. to the amendment of the $200,000 damage allegation as to ore extracted September 16th, 1893.

> "The cases are decisive that by the common law a plaintiff can recover damages only to the time of the bringing of the action."
>
> *Powers vs. Ware,* 4 Pickering 107.

> "If it continues afterward, the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered, for every continuance of the nuisance is a new nuisance. In such subsequent action all damages for such continuance since the commencement of the prior action are recoverable."
>
> *Sutherland on Damages,* par. 1038.

> "The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question whether the whole injury results from the original tortious act, or through the wrongful continuance of the state of facts produced by these acts.
>
> *Ridley vs. R. R.* 32 L. R. A. 709.

"If in fact it is continued during the pendency of the action, it is a wrong not in issue; it is a new wrong and the resulting damage is a fresh cause of action."

Sutherland on Damages, par. 1039.

"In trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated and therefore damages shall be assessed only up to the time of the wrong complained of."

Robinson vs. Blond, 2 Burr 1077.

"The rule is thus tersely stated in *Warner vs. Bacon,* 8 Gray, 397; 6 Am. Dec. 253: 'A fresh action cannot be brought unless there be both a new and unlawful act and fresh damage.' This rule is illustrated by many cases."

North Vernon vs. Volger, 103 Ind. 314.

"If an injury to land proceeds from a cause which is only temporary in character and abateable, it constitutes a continuing nuisance for which the injured party may maintain an action as often as he suffers damage, each action being limited to the injury sustained by him up to the time of the bringing of the action."

24 Enc. Law 2d Ed. 791.

"For a permanent injury to or trespass upon real estate all damages caused, present and prospective, are recoverable in one action. * * * * Where, however, the injury or trespass is only temporary in character, only such damages are in general recoverable as have occurred up to the date of the institution of the action, for subsequent damage successive actions being maintainable. The

reason for this distinction is that the law will not presume the continuance of the latter class of wrongs, but rather, as they are of a nature temporary and remediable, will suppose their discontinuance and abatement after the recovery of any damages therefore. And if in such cases all damages were recoverable in a single action, and successive suits could not be maintained, the verdict and judgment in the first action would operate as a virtual purchase of the right by the defendant to do that, on account of which the action for damages was brought; and in a certain sense legalize the defendant's wrong."

8 A & E Enc. Law, 2d Ed. 685-686.

"We agree with the Tennessee court that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, or allow a license to continue the wrong when the cause of the injury is of such a nature as to be abateable either by the expenditure of labor or money; and that where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrongdoer are only such as have occurred before the action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."

Sutherland on Damages, par. 1046.

This author cites in support of the doctrine announced in his text as first hereinabove quoted:

Baltimore vs. Church, 137 U. S. 568.

And the author of the text in A & E Enc. Law 2d Ed., supra, cites:

Wilcox vs. Plummer, 4 Peters, U. S. 172.

Fort vs. R. R. 2 Dillion U. S. 259.

See also *Uline vs. Ry.* 101 N. Y. 98.

Hambleton vs. Vere, 2 Saunders, 170.

Roswell vs. Pryor, 2 Polk 459.

Bowyer vs. Cook, 4 C. B. 236.

21 *Enc. Pl. & Pr.* 21-22, citing.

Milwaukee Ry. Co. vs. Ry Co. 6 Wall. 742.

Here was not only an amendment unauthorized by law, but a violation of every principle of the law of waiver, by forcing the alleged original waiver, to be applied to the application to amend made 6 years afterward; and as well, a clear abuse of discretion, in allowing it (if there were any power to allow it) without any showing whatever to excuse that long delay or any showing at all; and even after plaintiff, had, against our objections, produced all its proofs of value, and we ours under its assertion that its pleadings were aufficient and satisfactory to it.

ASSIGNMENT XXV.

Not only did we thus suffer in damages by that amendment to the extent of $130,000.00 but the court went further and told the jury by its charge 17, that as to all ore dug after the commencement of this suit, we were charged with knowledge and notice of the plaintiff's title and therefore could not be an innocent or other than a wilful trespasser. And thereby denied us the credits of the reasonable cost of handling and treating,

which, by its charges 18 and 11 it limited to an innocent trespasser. This affected all the ore between the planes, and all, except that in block 10. as to which, alone, could the jury, under the court's charge, consider us an innocent trespasser. This position of the court was accentuated by its refusal of our offered instruction No. XLIV.

Had there been separate suits for the new digging after the beginning of this suit, the jury could have found us innocent as to all in the second suit, unless the court had therein told them that the beginning of the single suit would make us a wilful trespasser as to all digging done thereafter. Herein the court's action prejudiced us as to this supplemental recovery; and forced our alleged waiver of six years before to operate actively against us now, under new and unanticipated conditions. The court misapprehended the principle distinguishing an innocent from a wilful trespasser. A mere claim, whether oral, or in writing, or by a complaint in a suit filed,—the latter being nothing more or less than a formal claim in court,—could not operate to change us from an innocent to a wilful trespasser, for the claim might prove unfounded, or the suit in which the complaint was filed might be finally won by the defendant. The single test is the honesty of our belief of ownership. It goes without saying that that belief might be as honest after as before suit brought, and not until the matter had become res adjudicata by a judgment of a court of last resort, determining the question against us, could the principle be applied that the court told the jury governed from the

time of the beginning of this suit. For the distinction between a final judgment for the mere purpose of appeal and one final in the sense of finally disposing of the rights of the parties, see:

> *Russia Cement Co. vs. LePage Co.,* 55 N. E. 70-73.
>
> *In re Brightman,* 14 Blatch. 130.

That good faith and honesty of claim and motive may exist, though an adverse claim be in suit, is beyond debate, both on reason and authority.

> "The quality of the good faith which warrants its application is satisfied if the wrong was done without culpable negligence or wilful disregard of the rights of others, in the honest and reasonable belief that the act was rightful. Notice of the existence of an adverse claim is an important element to be considered, but such notice alone will not necessarily place the wrongdoer in the position of a culpably wilful trespasser and subject him to the more onerous measure of liability."
>
> *Sutherland on Damages,* par. 1020, p. 2246-2248.

> "The court below permitted the appellee to give evidence as to the intention and motives of appellant's superintendent in mining and taking the coal. This action was assigned as a cause for a new trial. * * * * * Here one paragraph of the complaint does charge a wilful trespass and the intention and motives of appellant's superintendent at the time of taking the coal were material as bearing upon the measure of damages."
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> *Sunnyside Coal Co. vs. Reitz,* 39 N. E. 543.

"The court should have instructed the jury as to the different phases of the rule for the admeasurement of damages, that are dependent as above shown upon the presence or absence of wilful intent in the conversion."

Wright vs. Skinner, 16 So. 333.

"On the other hand the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake *and the wrong was not intentional, the value of the property when first taken must govern.*"

Woodenware cases, 106 U. S. 432.

"But the facts of the case prevent the conclusion that he could *have honestly believed* that he was entitled to cut timber for sale on either quarter."
quarter."

U. S. vs. Williams, 18 Fed. 478-480.

It is clear that on the issue of wilful or innocent trespass the intent and motive of the party taking is the subject of inquiry. It is plain that where, as here, each party had asserted its respective claim by suits, the suit of neither could operate as matter of law on the mind, motive or intent of the other. In a case of wilful trespass the higher measure of damage invariably operates to award more than compensation, because more than could possibly have been realized by any one from the ore; and to the extent of the excess it is a punishment for the intentional taking of property known to belong to

another. It is absurd to say that when A honestly believed in his rights against B's claim, of which he well knew, that because B places that claim in court, *eo instanto* A's mind necessarily undergoes a change and thence-forward his honest belief is that B and not himself owns the ore—and this though he may have himself already sued B for some of the same ore taken by the latter. *Non constat* but A may finally win and thereby judicially and conclusively demonstrate the absolute good faith of his continuous claim.

ASSIGNMENT XLIV.

The court in its charges 11 and 18 practically told the jury that a wilful trespasser could have no credit either for extraction, or for cost of treatment, or handling; and declined to advance the correct rule, by refusing our offered instruction XLIII. Thus as to all ore dug, save as to block 10, he forced the jury, not only to regard us as wilful trespassers but to apply an erroneously higher measure of damages, i. e. the assay value, without credit of any kind.

Even in the case of a wilful trespasser, where as here, the action is, in form, trespass to realty, the only penalty imposed is the loss of what was expended during the trespass. As the trespass is complete when the ore is broken from the ledge, or severed from the realty, the measure of damages is necessarily its value at the moment of severance from the soil. As the mineral contents are the entire value of the rock, and at the moment of

severance they are worth what they will yield in money on reduction, that value, less the expense of reduction, i. e. handling and treatment from the point of severance, is the true measure as to a wilful trespasser, who loses what he has expended in gaining access to the ore and severing it from the soil. This rule not only accepted by authority generally, but, we insist, recognized by the Supreme Court of the United States.

It is clearly announced in *Maye vs. Tappan,* 23 Cal. 306, a case quoted approvingly in 3 *Sutherland on Damages,* Section 1020. And the author, after quoting the above case, cites the Supreme Court of the United States in the Benson case as following the principles there announced. In the Benson case the court found the trespass to be wilful, but allowed as a credit on the value of mineral contents in the rock, the cost of removing the ores from the mines and treating them. We quote from its opinion as follows:

> "The trial court found the value of the ores at the time of their conversion by the defendant was $11,716.65; *that after the ores had been mined and become chattels* there had been expended by the defendant and others, in removing the ores from the mine, in assorting the same from the worthless rock, and in transferring the same to the smelter, the sum of $7,985.83, and gave judgment for the difference, to-wit: $3,730.82 and interest. * * * * * *
> The contention of the appellant is that there was error in not crediting it also with the cost of mining the ores, but as it received and converted them with knowledge that they belonged to the plaintiff, the ruling of the trial court was, within the decision in

Woodenware Co., vs. U. S. 106 U. S. 432, as liberal to the appellant as it had a right to expect."

Benson vs. Alta Mng. Co. 145 U. S. 428-434, 36 Co. Op. 762-765.

"We are also of the opinion that the District Court applied the correct measure of damages. The defendants being willful trespassers, it was proper to allow the full value of the coal mined without deduction for their labor and expense in mining the same, the rule of damages being the value of the ore at the time and place it was severed from the realty. * * * * In this case the value of the coal at the collar of the shaft is stipulated to have been $2.05 per ton. By deducting from this amount the cost of transporting the coal from the point in the mine where broken to the collar of the shaft, viz 12 cents per ton, left the actual damage $1.93 per ton, as found by the District Court."

U. S. Coal Co. vs. Coal Co., 24 Colo. 123, 48 Pac. 1047.

"It is also urged that the jury was misdirected as to the measure of damages in that they were told to find the value of the stone after it was broken in the quarry and ready for removal. Defendant contends that it is liable only for the value of the stone as it lay in the land and as a part of the realty. The plaintiff asked only for the value of the stone taken after the land was surveyed and the true boundary ascertained, and it is very clear that as to such stone the trespass was wilful. * * * * * In the case at bar, the jury was advised to find only the value of the stone after it was detached from the land and had become personalty, *and that is within the rule as laid down in all courts.*"

Cheeney vs. Nebraska Stone Co. 41 Fed. 741.

In the next case, jumpers by invalid location were allowed credit not only for reduction, but for the *extraction* cost of ores, the court saying:

> "The right to locate or re-locate a mining claim depends upon the right to enter upon the land where the mine is situated at the time the location is made. * * * * The testimony of the defendants shows that while in the possession of this mine they extracted and removed therefrom 553 tons of ore, which they converted to their own use. The same testimony shows the net value of this ore to have been about $2.50 per ton in the mine allowing for extraction and reduction. * * * * * It is in evidence, undisputed, that the plaintiff, by its well known agents, remonstrated with defendants and denied their right to locate the mine, or work upon the same, or remove ore therefrom and constantly asserted plaintiff's rights. And finally plaintiff was compelled to bring this action to dispossess defendants. We have, however, adopted the measure above indicated, allowing the defendants the cost of extraction and reduction. Non constant, however, but that plaintiff could have extracted and reduced this ore at less expense than it was done by defendants."

Aurora Mng. Co. vs. '85 Mng. Co. 34 Fed. 515-521.

ASSIGNMENT XXVII.

Herein the court charged the jury that upon the issue of good faith in ore extraction, the defendant must prove it by the same measure of proof that would be required of it had it invaded the surface boundaries of the St. Louis claim. This was clearly error for the fact that it was

digging and extracting beneath its own surface was a potential fact to be considered upon the issue of good faith; and a fact which never could be considered if it were beneath the surface of the St. Louis, while the charge of the court denied not only the benefit of the inferences resulting from the work being done within its own surface, but put upon it the adverse inference that would have arisen had it been down beneath the surface of the St. Louis. So to, it ignores and directs the jury in effect to disregard, all the peculiar facts bearing on the title to the Compromise strip and the precedent litigation with reference thereto, in evidence in that case, when considering the issue of honest belief of ownership.

ASSIGNMENT XXXI.

Here the Court charged the jury in effect that they should give no credit for ores held by the defendant under injunction process secured by the plaintiff itself, because it told them that the defendant must have offered or left the ores in the possession of the plaintiff and proven their value, and this in the face of the fact that the injunction order expressly required the defendant to keep the ores and not to give them to anyone; and in the face of the further fact that the offer of the ores or delivery thereof by defendant to plaintiff would have been an abandonment of defendant's claim of right and title, which formed the basis of its defence in the injunction suit. Clearly the defendant was entitled to this credit upon the proof of the value of the ores alone, otherwise, it recovers in this suit

as for a conversion, when the injunction suit had operated to prevent a conversion, and it would recover again in the injunction suit. The court, in its charge, believed that it was following your Honors' views, but clearly your Honors denied the credit because in the record then before you there was neither proof of tender nor of value; either would have satisfied your requirements: the court here required both, and therein committed error, making its position the more plain in this regard by refusing our offered instruction L which clearly and correctly stated the law.

ASSIGNMENTS XXIII, XXIV AND XLIV.

Charging the jury, as the court did in its charges numbers 5, 8 and 11, that the defendant must prove certain specified features "to their satisfaction", is fatal error, unless in some manner cured.

> *Brady vs. Mangle,* 109 Ill. App. 172.
> *Amer. Dig.,* 1904-B, p. 486, Par. 20-E.
> *Thompson on Trials,* Par. 2318, note 6.

This erroneous measure of proof was made the rule of guidance to the jury unaccompanied by the limitation "from the evidence" or "by a preponderance of the evidence"; nor was the phrase "burden of proof" in any manner implied in two of them. And as to the specific fact inquiry, covered by the charge, there was nowhere any correct rule of guidance laid down. While it is claimed that charges 14 and 25 cured the error, it will be

noted that they were generally dealing with the measure required, to satisfy the "burden of proof." As to two of these charges there is not even a suggestion to the jury that the fact inquiry alluded to was one of the instances where the rule, elsewhere given as to "burden of proof," should be applied. A comparison of the facts in the Brady case, supra.—where in the very same single charge the rule was both correctly and uncorrectly given, and where in more than half the charges of the court the rule was correctly stated,—with the charge in this case will show how impossible it is to here assume that this error was in any manner cured. The jury would have undoubtedly applied the specific rule given them by the court in their inquiry as to the specific issue affected by the charge.

ASSIGNMENTS XXIII, XXIV, XXVIII, XLIII, XLV, XLVI and XLVIII.

The court through the medium of alleged presumptions erroneously put the burden of proof upon us as to nearly every issue and refused all our offered instructions correctly stating the rule. In its charge number 14 it advised the jury that a presumption arose that the trespass was wilful if the ore was dug from a vein apexing in plaintiff's claim. In 15 it vaguely told the jury that the law would supply deficiencies of proof by making every reasonable intendment, etc., without in any manner applying or defining the latter phrase, itself having no fixed legal meaning. And it did the same thing in even a more

direct and injurious manner in charge 20. In charge 16 it allowed them to fix the value by resorting to any other ores,—however dissimilar in kind—in the "vicinity" without defining the latter phrase, or limiting it to ores similar in class. In charge 5 it shifted the whole burden of proof as to the discovery vein and by charge 8 created a presumption as to continuity of that vein, putting the burden on us to overcome it; and by charge 9 it conferred extra-latreal rights, though the discovery vein did not cut either end line but might have passed out the side lines, if any co-called "connecting veins" ran lengthwise between the side lines from the 520 to the 108 foot plane,—though themselves not reaching either end line.—We confidently assert that as owners of the surface, we are prima facie owners of every ounce of mineral rock beneath; that the burden is on the plaintiff as to every material issue throughout the whole case. That, though it might—by making a prima facie case on issue where there was no presumtion in our favor, as there is in the case of the general presumption of ownership of the rock beneath our surface—satisfy this burden, were no opposite evidence submitted, that the mere satisfaction of the burden does not shift the burden at all, but upon the whole evidence it remains as it originally was.

Montana Co. vs. St. Louis Co., 194 U. S. 238-239
48 Co. Op. 995.

Parrott Co. vs. Heinze, 25 Mont. 139, 53 L. R. A.
491, 64 Pac. 326.

(The latter case, quoted by the United States Supreme Court in the former case.)

> *Doe vs. Waterloo, etc.,* 54 Fed. 935.
> *Consolidated Co. vs. Champion,* 63. Fed. 540.
> *Catherine Co. vs. Ajax Co.,* 182 U. S. 508.

We respectfully invite your Honors' consideration of every error assigned, though not specially argued herein, believing that many of them will help to explain the reason why the jury so enormously increased the original award in the first trial.

IN CONCLUSION, WE SUMMARIZE:

1. The failure to allege the course or direction of the discovery vein was fatal to plaintiff's case.

2. By disclaiming the Compromise strip and the mineral within it in this complaint, the plaintiff barred himself of recovery for any such mineral.

3. Because the Drum Lummon vein enters and departs from the same sigle side line, it could have no extralateral rights.

4. The decree of injunction in the specific performance case, forbidding any claim of possession or right of possession in not only the ground but as well all mineral therein, and the involuntary conveyance under its mandate, are an absolute bar to this action of trespass, both because they conclusively determine title in us and be-

cause an action of trespass must depend upon possession or right of possession.

5. The refusal of the court to hear evidence as to the situation of the property and the parties to the bond at the time of its execution, to interpret its language and the language of the decree, was fatal error.

6. Suffering the amendment from $50,000.00 to $400,000.00 supplemental damage, at the end of the trial, was grievous error.

7. The court erred in conclusively finding us wilful trespassers as to the ore dug after the beginning of this suit.

8. It erred in the measure of damage prescribed for a wilful trespass.

9. It erred in denying us credit for the injunction ores because not delivered to the plaintiff.

10. It erred in testing our good faith as to ores dug before the suit begun as if we were beneath the St. Louis surface.

11. It erred in its entire theory as to presumtion and burden of proof and in requiring us to prove certain facts specially to the satisfaction of the jury.

12. Generally the errors assigned are substantially so prejudicial as that by the latitude allowed to the jury they account for the enormous verdict.

We insist that to suffer this judgment to stand would be a grievous violation of law, justice and right.

Respectfully submitted,

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Helena, September 25th, 1905.